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No. 533/12

Supreme Court, U.
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IN THE

SUPREME COURT

OF THE

United States

October Term, 1952

PATRICK E. IRVINE,
Defendant and Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee.

PETITION FOR WRIT OF CERTIORARI
BRIEF IN SUPPORT OF PETITION
and
MOTION FOR LEAVE TO PROCEED ON TYPEWRITTEN RECORD

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IN THE

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OF THE

United States

October Term, 1952

PATRICK E. IRVINE,
Defendant and Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Patrick E. Irvine, hereby petitions for a Writ of Certiorari directed to the District Court of Appeal, State of California, Second Appellate District, Division Two, to review and reverse the judgment of conviction for violations of Section 337a of the Penal Code of the State of California.

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JURISDICTION

Jurisdiction arises out of Title 28, Section 2101-4, U. S. Codes and Rule 38-½ Rules of the Supreme Court of the United States.

The decision of the District Court of Appeal, Second Appellate District, State of California was rendered October 2, 1952 (R. 964); a petition for hearing was filed in the Supreme Court of the State of California and denied on October 30th, 1952 (R. 990), two justices, Justices Carter and Schauer, voting for the granting of the petition (R. 990). Thereafter the District Court of Appeal stayed the judgment to permit the filing of a Petition for Writ of Certiorari in this Court, which petition is being filed within the 90-days provided by Rule 38-½ Rules of the Supreme Court of the United States.

STATUTES INVOLVED

Title 26, Section 3285 of the Internal Revenue Code, provides as follows:

> "§3285. Tax.
>
> (a) Wagers. There shall be imposed on wagers, as defined in subsection (b), and excise tax equal to 10 per centum of the amount thereof.
>
> (b) Definitions. For the purposes of this chapter—
>
> (1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting

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such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) and drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

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(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

(f) Territorial extent. The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States. Oct. 20, 1951, 2:07 p. m. E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529."

Title 26, Section 3287 of the Internal Revenue Code, provides as follows:

"§3287. Certain provisions made applicable.

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax imposed by this subchapter. In addition to all other records required pursuant to section 2709, each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable. Oct. 20, 1951, 2:07 p. m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529."

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Section 337a, subdivisions 1, 2, 3, 4, and 5, of the Penal Code of the State of California, provides as follows: Every person,

"1. Who engages in pool-selling or book-making, with or without writing, at any time or place; or

2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing, or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or

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contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, inknown or contingent event whatsoever; or

5. Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, inclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivisions 1, 2, 3 or 4, of this section; or . . .

Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said sub-

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divisions 1 to 6 inclusive. [Added by Stats. 1909, p. 21; Am. Stats. 1911, p. 4.]"

Section 334 of the Penal Code of the State of California, provides as follows:

"§334 [Incrimination]: Witness' privilege. No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified. [Enacted 1872.]"

Section 640 of the Penal Code of the State of California, is as follows:

"§640 [Tapping or unauthorized connection with telegraph or telephone line; Interception of communications and use of information so obtained; Aiding or conspiring to tap line: Punishment.] Every person who, by means of any machine, instrument, or contrivance, or in any other manner, wilfully and fraudulently, or clandestinely taps, or makes any unauthorized connection with any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company; or who wilfully and fraudulently, or clandestinely, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any telegraph or telephone

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wire, line, or cable, or is being sent from or received at any place within the state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained; or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things hereinabove mentioned, is punishable as provided in section 639. [Enacted 1872; Am. Stats. 1901, p. 478 (unconstitutional); Stats. 1905, p. 691; Stats. 1915, p. 210.]"

Title 47, Section 605, as follows:

"§605. Unauthorized publication or use of communications. No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or

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publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, §605, 48 Stat. 1103.)"

Fourteenth Amendment to the Constitution of the United States, provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

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or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OPINIONS BELOW

The opinion below is found in 248 Pacific (2) 502 and is also contained on page 964 of the record, and also again on page 983 of the record.

SHORT STATEMENT OF FACTS

On November 5, 1951 Patrick E. Irvine, the petitioner, applied for and obtained a special wagering stamp from the Department of Internal Revenue, and tax division thereof, for which he paid the sum of $50.00. (R. 133). The stamp number was set forth in the information or charge against the petitioner. (R. 1). Following this procedure the state authorities employed Russell D. Mason, (R. 18), to install microphones and electronic devices on behalf of the Police Department of the City of Long Beach, and attach a recording machine thereto. The police had obtained a duplicate key for one of the doors to the premises of the appellant, at 3916 East Second Street, in Long Beach, which was the home of the appellant and his wife Mildred. They strung wires from the Irvine home on East Second Street to about 700 or 800 feet distance to a garage where they had a microphone

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and recording device installed. They entered the house secretly and without any search warrant or other process to install the microphone, and then thereafter they entered twice after that and changed the microphone, on December 8th and again on December 28th, because of interference from a flouorescent lamp which made the hearing over the recording device very difficult. (R. 135).

After the microphone had been installed, Mr. Mason together with officers Calori, Gautt, Hermansen, Kennedy and Jacobsen, were detailed to work at stated hours in the garage with the amplifier and to listen to conversations which they heard and desired to have recorded. It was discovered that Mr. Lippe, another defendant, was entering the defendant's home and that he also returned to a building in Los Alamitos, Orange County, 10851 Chestnut Street in that city, where he had two phones and various bookmaking apparatus and paraphernalia.

Through the installed listening device at Mr. Irvine's home the officers heard telephone conversations, and would hear Mr. Irvine dial the telephone and then call bets to some person on the other end of the phone, referring to that person on such occasions as "Jamoke" who it was asserted is a nickname for Mr. Lippe. On various occasions they heard Mrs. Irvine call out bets on the horse races naming the track and the horses and the amounts of bets taken, which were related in phone conversations.

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On January 5, 1952, by a prearranged plan, having learned the streets that were driven on these trips back and forth, it was agreed among the officers that Mr. Jacobsen would obtain a quantity of fluorescent powder, which is invisible ordinarily and is not visible at all unless and until subjected to an ultra-violet ray lamp. It was further agreed that they would stage a pretended road block when Pete Curti was making his trip back into Mr. Irvine's home, and as part of that plan Mr. Gautt, one of the officers who had been working on this case at the garage, was a decoy. He was to be stopped, having his automobile stopped, and searched as though someone had just committed a hold-up over in Garden Grove or that vicinity, and it was further suggested that Mr. Gautt was to get his automobile directly in front of Pete Curti's automobile so that when he was stopped the Curti automobile would be stopped directly behind him. There were motorcycle officers there to stop both persons; Mr. Gautt was compelled to get out of his car and hold up his hands and was searched, and a gun was found in the waistband of his trousers and the gun was taken and he was told to get in the car. Directly behind the car was the car of Mr. Curti and in the car with him at that time was Audie Greer. The same idea was carried out by the officers there. They were told that a hold-up had just been perpetrated and that it was a car similar to the car in which Mr. Curti was riding. Mr. Curti and Audie Greer got out of the car and there were a large number of betting markets, papers

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and other articles alleged to be betting markers partly concealed under the coat of Audie Greer, which she held in her hand and she was directed to place everything back in the car. The officers being in uniform at that time, she laid these things down on the seat of the car, and while pretending to search the car Mr. Jacobsen, with a fluorescent powder all over his hands, pawed through the papers and pretended to look for guns and touched and impregnated all of the papers with the fluorescent powder. Some of the papers were taken from the shirt pocket of Mr. Curti which were perfunctorily examined and also impregnated with fluorescent powder and given back to him, and they were permitted to go on their way.

A short time later, after they had gone to the home of Mr. Irvine, officers entered the house, placed Mr. Irvine under arrest. In his desk and about his desk, in addition to many other things, they asserted they found these same papers with the same fluorescent powder on them and they were subjected to the ultra-violet ray test in the presence of Mr.. Irvine. They also put the ultra-violet ray light upon his hands and there was fluorescence all over his hands, they asserted. These papers, it is alleged, were betting markers.

The appellant was convicted of violation of section 337(a), subdivisions 1, 2, 3 and 4 of the Penal Code of the State of California (R. 110, 111, 112, 113) as alleged in Counts II, III, IV and V of the Information (R. 1 to 4).

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Early in the trial, in the trial court in the Superior Court for the State of California in and for the County of Los Angeles, at Long Beach, California, where the case was tried, the appellant raised the point that he could not be prosecuted because he had already obtained a stamp from the federal government and that the State therefore had no right to prosecute him. (R. 242-247). The appellant also raised the point that installation of the microphone in his home, without any search warrant or other process and thereafter recording telephone conversations constituted a violation of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, in that the evidence was illegally obtained in violation of due process of law and also consisted of recordings of telephone conversations without the consent of either the receiver or the sender of the conversations. That these violated his rights under the federal constitution. (R. 244-247).

There was a standing objection throughout the trial based upon these contentions and although frequently the objections were repeated, the court overruled all objections and permitted the objection to go to all the proceedings. (R. 247).

It was also pointed out and made a part of the objection that wire tapping in the State of California is forbidden by Section 640 of the Penal Code and therefore the use of such wire tapping evidence constituted a violation of due process of law guaranteed by the Fourteenth Amendment.

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Following the overruling of the objections, the court permitted conversations had over the wire recorded and heard over the telephone to be received in evidence against the appellant. (R. 249, et seq). Thus telephone conversations which were heard over the installed wire recording are listed on page 363 of the Record:

> "A. I heard the sound a a 'phone being dialed. I heard Mr. Irvine's voice.
>
> Q. Very well.
>
> A. I heard Mr. Irvine says 'Can I speak to Jamoke'? Then I heard Mr. Irvine say, 'In the first place you've got the horse down wrong.' Then I heard him say, 'In the 8th, 2 to win.' Then I heard him say 'King's Boy, 2 to win. In the fourth, Handy Display. In the fifth, Limbo Junior, 2 to win. I've got some more for you. In the third, Clam Digger.' And I heard him say the word 'Fair Grounds.' And that is all of that particular conversation I recall at this time." (R. 363).

On December 11th he again recorded a phone conversation. (R. 364):

> "I heard the sound of a 'phone being dialed and I heard Mr. Irvine say, How you doing, Tony?' Then there was a pause. Then I heard Mr. Irvine's voice says, 'Here's a parlay, 1-7, 2 across.' And '47-58-68-73-84-57-65-83.' Then '16-51-1-across parlay."

Other conversations are recorded on pages 365, 366 and 367, 384. The conversation of December 29th:

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"I heard Mr. Irvine—I heard a phone being dialed. I heard Mr. Irvine say, 'How're you doing, Pete?' I heard him say, 'Tropical, 37, 64, 9.11, 96, one and one criss-cross. Whitman, one to place, criss-cross.' Then I heard him says, 'You made a mistake on Nelson. You paid him 7.20 for the $5 he bet and that 7.20 was payment for only $2.' " (R. 384).

Oher conversations are recorded on page 385, 386 and 387.

On December 2nd, the police took a key-man to the home of Mr. Irvine to have a skeleton key made of the premises. (R. 642). They gave him nothing to guide him, just asked him to make a key and he pushed into the lock to locate the tumblers and then filed the key until it opened the lock. (R. 643). He made the key on the front porch of Irvine's home, but without Irvine's consent. (R. 643). The officers, Inspector Kennedy and Officer Hermansen, got the key the following day. (R. 644). They walked into the house through the key they stealthily got, looked around at papers and things. (R. 646, 647). They examined the papers in the house under fluorescent light. (R. 649). They demanded Irvine to come over and put his hands under the light; he walked over and put his hands underneath the ultra violet light. (R. 650, 651). There was a reaction on his hands when he put them underneath the light. There was a search made of the house (without any search warrant or any other process by the officers). (R. 653). In the house they found the

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government issued waggering stamp belonging to Morris Lippe. (R. 654). In the bedroom they saw a racing form and 46-sheets of paper and a little note book. (R. 655). In Mr. Irvine's room there was a book with a list of telephone numbers. They took pictures of the bedroom and pictures of the place. They searched the place and picked up books, papers and paraphernalia and several things which were introduced into evidence as Exhibits 22 et seq.

The microphone in the petitioner's house was removed on January 5th. (R. 667). The wagering stamp was found in a drawer of Irvine's home. (R. 668).

Frederick L. Good, a police officer of the City of Long Beach testified that on the night of January 5th, he took a special tax stamp, wagering, bearing the name apparently in typewriting "Irvine, Patrick E." and the address 3916 East Second Street, Long Beach, California, wager 28506, November '51 and then bearing a date, 11/5/51, which was marked as People's Exhibit 36. (R. 690). He said he took it from the wallet of the defendant, Patrick Irvine in the city jail on the night of January 5. (R. 690). There was also on the stamp tax the sum of $50.00. There was an objection to the introduction of the stamp in evidence because it was obtained in compliance with the federal law and therefore could not constitute an illegal act and can't be used to prove an illegal act of the state. (R. 691-692). This objection was overruled. (R. 692).

There was also introduced in evidence over objection the photostat of an original application, dated

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October 31, 1951, of Patrick E. Irvine to the Head of the Wage and Excise Tax Division of the United States Government, which constituted an application and report in a government report issued by the government regarding the application. (R. 854). The objection was overruled. (R. 855).

The court permitted in evidence all of the exhibits 63 to 74 from the records of the Office of the Collector of Internal Revenue. (R. 864). Exhibit 63 is the application of Patrick E. Irvine, the petitioner herein.

Objection to the installation of the microphone in the home of the appellant and the obtaining of testimony in that manner was objected to as a violation of due process of law (R. 922) and as using standards forbidden in the case of *Rochin v. People of the State of California* on motion for a new trial (R. 922) which motion was denied. (922).

The appellant was sentenced to one year in the county jail on Count II, (R. 946), six months in the county jail on Count III and the sentence to be suspended on the condition that he pay a fine of $1500.00 or to run consecutively with Count II; six months in the county jail on Count IV, suspended, and six months in the county jail on Count V, suspended. If the fine is not paid the six months is to run consecutively with the year's sentence. (R. 947).

The trial judge gave the following instructions to the jury:

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"You are instructed that you are to consider all evidence which the Court has permitted to be introduced for your consideration, irrespective of the manner by which such evidence has been obtained, and to give to all of such evidence the weight to which you shall find it to be entitled.

The above instruction refers specifically to the testimony tending to prove that a microphone was placed in the home of defendant Patrick E. Irvine without the knowledge or consent of either the said Patrick E. Irvine or his wife, Mildred Irvine, and then connected by a wire to a distant point where it has been testified a recording machine and a loud speaker were installed and voices originating in the home of defendant Irvine were allegedly heard over the loud speaker and recorded on the recording machine. Such evidence (if you find that it was so obtained) is legally admissible in this State the same as any other competent evidence." (R. 42).

"You are instructed that any trespass which you may find to have been committed upon the property of the defendants, or any of them, is not to enter into your deliberations in weighing the guilt or innocence of these defendants or to be considered by you in any manner whatsoever. That is a matter in which defendants have a separate remedy at law but which has no part in this trial. It is your duty to consider only the evidence which has been admitted for your consideration and determine from such evidence whether the guilt of defendants, or any of them, has been proved, and render your verdict accordingly." (R. 35).

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"You are instructed that, effective November 1, 1951, Federal Laws require that every person who engages in the business of accepting wagers on horses or on any other sporting event, is required to make application to the Collector of Internal Revenue for a wagering stamp, which stamp must at all times be kept at the place of business of such person, or if he have no place of business, carried at all times on his person. Such person shall make monthly reports to the Collector of Internal Revenue showing the business he has done for the previous month and pay a tax on such amount, less any credit for so-called "lay off" bets, that is, as defined by Federal law, bets received from another person engaged in accepting bets who has paid or reported such "laid off" amounts himself.

Such Federal laws also provide that an individual may be primarily engaged in business as a salesman or merchant, for example, and if in addition to such regular business he accepts bets for profit, he shall be deemed to be engaged in the business of accepting wagers. Whether a person accepts bets for himself alone or for others, he is required to purchase the wagering stamp and pay the tax imposed.

However, none of the defendants is here being charged with violation of any Federal laws, but only for the specific crimes described and charged in the information filed by the District Attorney.

You are further instructed that the payment of any tax imposed by the Internal Revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punish-

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ment provided by the laws of this State for carrying on the same within this State or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of this State. The special tax stamp is not a license or permit and affords no protection from prosecution for violation of any Federal or State Law." (R. 72, 73).

The appellant appealed to the District Court of Appeal for the State of California, Second Appellate Department, Division Two, which sustained the judgment of the trial court as against the contention that the rights of the petitioner under the Constitution of the United States had been violated and held that he had not been denied rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. (R. 968, 969).

The petition for hearing in the Supreme Court of the State of California was denied on October 30th, 1952, in which the rights under the Federal Constitution were again reasserted, (R. 979, 980, 981), and the Supreme Court of California denied the hearing, two justices however were of the opinion that the petition for hearing should be granted—Justices Carter and Schauer. (R. 990).

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QUESTIONS PRESENTED BY THIS PETITION

I.

Whether the Wagering Stamp Tax provided for by an Act of Congress may be nullified and defeated by state officers arresting a person so taxed and thus licensed.

II.

Whether a State may take advantage of the fact that the Federal Government taxes a person on the presumption that the tax is upon a lawful occupation to use that fact as compelled evidence against a person under a state law and thus convict him of a state crime on the basis of evidence which he has been compelled to give by reason of a Federal Statute; and whether conviction based upon such evidence violates the due process clause of the Fourteenth Amendment to the Constitution of the United States

III.

Whether the method used by the police in this case of secretly having a locksmith make a key to appellant's home and thereafter entering it and installing a microphone and thereafter installing listening devices and obtaining evidence of telephonic and other conversations in the home violate those fair and fundamental standards of justice consonent with due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

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IV.

Whether a fair trial has been had in this case where evidence obtained by compulsion of a Federal Statute and obtained by burglary into appellant's home and in violation of fundamental rights constitutes a fair trial within the meaning of the Fourteenth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

This case involves fundamental questions of constitutional law which have not been, but should be, passed upon by this Honorable Court under the facts involved in this case: namely:

(1) Whether a State may through its criminal laws defeat and extinguish a federal tax passed by Congress and the opportunity to continue collecting such tax?

(2) Whether an Act of Congress imposing a tax upon wagering constitutes a license to wager which cannot be impaired by State law?

(3) Whether a defendant may be tried and convicted in the State courts upon evidence obtained by compulsion of a Federal Statute, and thereafter introduced in evidence against an accused in the State court?

(4) Whether compelled evidence under the Federal Statute within the meaning of the Fifth Amendment to the Constitution of the United States may be used in a state court without violating the Fourteenth Amendment to the Constitution of the United States?

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(5) Whether evidence obtained by burglarious entry of the police into the home of the appellant and by listening devices thereafter installed and recordings of telephone conversations through those listening devices and used in the trial of the appellant against him constitute such uncivilized standards as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

(6) Whether under the facts and circumstances of this case the appellant has been deprived of a fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States?

Each of these questions is fundamental. The District Court of Appeal of the State of California, Second Appellate District, has denied that the appellant's rights under the Fourteenth Amendment to the Constitution of the United States were violated and the Supreme Court of California has denied a hearing—two justices voting for the granting of the hearing.

It is respectfully submitted that the Writ should be granted by this Honorable Court and the judgments of the courts below reversed.

WHEREFORE, your petitioner prays for the granting of the Writ and the reversal of the judgments below.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. .....

PATRICK E. IRVINE,
Defendant and Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee.

BRIEF IN SUPPORT OF PETITION

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner adopts by reference the Jurisdictional Statements, the Statutes Involved, Opinions Below and the Statement of Facts Contained in the Petition for Writ of Certiorari as though fully set out and repeated here again.

QUESTIONS PRESENTED

I.

Whether the Wagering Stamp Tax provided for by an Act of Congress may be nullified and defeated by state officers arresting a person so taxed and thus licensed.

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II.

Whether a State may take advantage of the fact that the Federal Government taxes a person on the presumption that the tax is upon a lawful occupation to use that fact as compelled evidence against a person under a state law and thus convict him of a state crime on the basis of evidence which he has been compelled to give by reason of a Federal Statute; and whether conviction based upon such evidence violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

III.

Whether the method used by the police in this case of secretly having a locksmith make a key to appellant's home and thereafter entering it and installing a microphone and thereafter installing listening devices and obtaining evidence of telephonic and other conversations in the home violate those fair and fundamental standards of justice consonent with due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

IV.

Whether a fair trial has been had in this case where evidence obtained by compulsion of a Federal Statute and obtained by burglary into appellant's home and in violation of fundamental rights constitutes a fair trial within the meaning of the Fourteenth Amendment to the Constitution of the United States.

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REASONS FOR GRANTING THE WRIT

1. That an important question of federal law has been decided by the State of California contrary to decisions of this court, and involve important questions of the administration of criminal justice which have not been but should be decided by this Honorable Court.

2. Title 26, Section 3285, and 3287, the Wagering Tax Law, was adopted by Congress and the right of a state to interfere and defeat it have not been, but should be, settled by this Honorable Court, in accordance with principles that a state cannot restrict the National Government's operations within its sphere; where the police powers of a state interfere with the national tax, the state must give way.

3. Important questions of criminal law under the Fifth and Fourteenth Amendments to the Constitution of the United States are raised by this case, to-wit, whether evidence obtained by burglarious conduct of police officers, trickery, and recording of telephone conversations in one's home, so far offend the fundamental principles of justice which inhere in our institutions as to receive the disapproval of this Court under the Fifth and Fourteenth Amendments to the Constitution of the United States.

4. Whether wire-tapping forbidden by the laws of the state wherein it occurs shall be read jointly with Title 47, Section 605, U. S. Codes, the Federal Communications Act so as to make that act equally appli-

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cable in a state where a similar law exists and should result in the exclusion of evidence so obtained, thus distinguishing the case from *Schwartz v. Texas,* decided December 16, 1952.

SUMMARY OF THE ARGUMENT

I.

Congress had a constitutional right to fix the wagering tax toward paying for the national debt. When Congress, by Title 26, Section 3265-3267 (65 Stat. 529), passed the act fixing a tax upon wagering throughout the United States the state could not interfere with or interrupt the federal tax by arresting the purchaser and terminating his use of the stamp.. The person upon obtaining such a stamp and paying the tax was entitled to carry on wagering without interference from state authorities. A state may not interfere with a federally imposed tax by molesting and arresting the person paying such tax and thereby defeating the tax and its future collections. If it could do it in this case it could do it in any case.

Congress in fixing such a tax did so upon the theory that it was imposing a tax upon a legal operation—not an illegal operation.

II.

Where all persons engaged in the business of wagering are compelled by a law to make a declaration thereof and pay the tax and can be convicted upon

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the basis of evidence obtained by such compulsion under federal statutes, the use of such evidence in a state court constitutes a violation of due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

III.

The secret making of a key to appellant's home and burglarious entry into the home and installation of sound and recording devices and the taking of testimony heard over such apparatus, including telephonic conversations, without the consent of the receiver or the sender and in violation of Section 640 of the California Penal Code and Article I, Section 19 of the California Constitution constitutes the obtaining of evidence by standards contrary to the fundamental principles of justice that inhere in our institutions. It represents a new low in law enforcement which the courts must reject. The use of such evidence requires a reversal of the judgments below.

IV.

The use of evidence obtained by methods used by the police in this case and the prosecutor, using illegally obtained and compelled evidence, violates "fair trial" guaranteed by the Fourteenth Amendment to the Constitution of the United States.

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ARGUMENT

I.

CONGRESS HAD A CONSTITUTIONAL RIGHT TO IMPOSE THE WAGERING TAX, ARTICLE I, SECTION 8, U. S. CONSTITUTION. McCRAY v. U. S., 195 U. S. 27. WHEN CONGRESS, BY TITLE 26, SECTION 3285, 3287, PASSED AN ACT FIXING A TAX UPON WAGERING THROUGHOUT THE UNITED STATES, THE PERSON UPON OBTAINING SUCH A STAMP AND PAYING THE TAX WAS ENTITLED TO CARRY ON WAGERING WITHOUT INTERFERENCE FROM STATE AUTHORITIES. A STATE MAY NOT INTERFERE WITH OR DEFEAT A FEDERALLY IMPOSED TAX BY MOLESTING AND ARRESTING THE PERSON PAYING SUCH TAX AND THEREBY DEFEATING THE TAX AND ITS FUTURE COLLECTIONS. CONGRESS IN FIXING SUCH A TAX DID SO UPON THE THEORY THAT IT WAS IMPOSING A TAX UPON A LEGAL OPERATION—NOT AN ILLEGAL OPERATION.

On October 20th, 1951 the federal law regarding wagering stamps went into effect. On November 5th, the appellant pursuant to the commands of congress applied for and obtained such a wagering stamp. Had he failed to do so, he would have been guilty of a federal crime.

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It must be presumed that Congress intended to tax a lawful operation, and that it did so to collect money to pay the national debt.

Article I, Section 8, of the Constitution of the United States expressly confers on Congress the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

These purposes are very broad. The motive or purpose of Congress in levying the tax may not be inquired into by the courts.

> *McCray v. United States,* 195 U. S. 27, 49 L. Ed. 78, 1 Am. Cas. 561.

Having power to raise money to pay the debts of the United States, it of course follows that Congress has power to tax and make lawful operations that might even be deemed unlawful within the States. Since the rights are created for federal purposes a state may not through any of its agencies impair the federal tax. The United States has priority of the necessary consequence of the supremacy of the Laws of the United States on all subject to which the legislative power of Congress extends.

> *United States v. Fisher,* 2 Cranch. 358, 2 U. S. (L. Ed.) 304;
> *U. S. v. Darby,* 312 U. S. 100;
> *Opp Cotton Mill, Inc. v. Administrator,* 312 U. S. 144.

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No state may as an exercise of its own power lay any burden on the taxing power or impede the taxes imposed by the United States. *(Dobbin v. Erie County,* 16 Fed. 435, 10 U. S. (L. Ed.) 1022).

And see *McCulloch v. Maryland,* 4 Wheat. 316, 5 U. S. (L. Ed.) 579; *Williams v. Callacega,* 57 U. S. (L. Ed.) 275; *Farmers, etc. Savings Bank v. Minnesota,* 232 U. S. 516, 58 L. Ed. 706; *Choctaw etc. Railroad Co. v. Harrison,* 235 U. S. 292, 59 L. Ed. 234.

The framers of the Constitution did not design to make the federal government dependent upon the states.

> *McCulloch v. Maryland,* 4 Wheat. 316, 5 U. S. (L. Ed.) 579.

Nor are states allowed to defeat federally imposed taxes.

Exclusive jurisdiction is given to the federal government in this matter.

> *Yates v. Jones National Bank,* 206 U. S. 158, 51 L. Ed. 1002;
> *Easten v. Iowa,* 188 U. S. 220, 47 L. Ed. 452;
> *Cross v. North Carolina,* 132 U. S. 131, 33 L.Ed. 287;
> *In re Eno,* 54 Fed. 669;
> *U. S. v. Busbee,* 38 Fed. 99.

The priority given the United States cannot be impaired or superseded by state law. *U. S. v. Oklahoma,*

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261 U. S. 253, 260; *Illinois v. Campbell,* 329 U. S. 362, 370, 91 L. Ed. 355.

It is well settled in the case of banks that the power of Congress subjects these national banks to the paramount authority of the United States. That an attempt by a state to define their duties or control the conduct of their affair is absolutely void, and the only power of the states in respect thereto is only when it is specifically granted by Congress.

Owensborough National Bank v. Owensborough, 173 U. S. 664, 43 L. Ed. 850.
Veazie Bank v. Fenno, 8 Wall. 533, 19 U. S. (L. Ed.) 482;
Farmers Etc. Nat'l Bank v. Erie, 91 U. S. 29, 23 L. Ed. 196.

Once Congress has assumed to tax "wagering", nationally under its Constitutional power, a State may not interfere to diminish or defeat the tax without specific consent of Congress, which has not been given. There is no difference between this situation and federal taxation and jurisdiction regarding federal banks.

One who complies with the Federal Statute and obtains his wagering stamp may thereafter not be interfered with by the state authorities because it would thereafter defeat and impair the tax. Action by a state in the exercise of its police powers must, by virtue of the supremacy clause, Article VI, Clause 2, U. S. Constitution, give way to the act of Congress. *Brod-*

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erick v. Rosner, 294 U. S. 629; 79 L. Ed. 1100; *Morris v. Jones,* 329 U. S. 553; 91 L. Ed. 497.

The power of the state "may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'." *Hill v. Florida,* 325 U. S. 538, 542; 89 L. Ed. 1782, 1785; *Maurer v. Hamilton,* 309 U. S. 598; *Bethlehem Steel Co. v. N. Y. Labor Rel. Bd.,* 330 U. S. 773; 91 L. Ed. 1245-6; and see *Feldman v. U. S.,* 322 U. S. 490-3.

II.

WHERE ALL PERSONS ENGAGED IN THE BUSINESS OF WAGERING ARE COMPELLED BY A LAW TO MAKE A DECLARATION THEREOF AND PAY THE TAX AND CAN BE CONVICTED UPON THE BASIS OF EVIDENCE OBTAINED BY SUCH COMPULSION UNDER FEDERAL STATUTES, THE USE OF SUCH EVIDENCE IN A STATE COURT CONSTITUTES A VIOLATION OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The federal statute regarding "wagering tax and stamps" was compulsory. The appellant was compelled to apply or subjected himself to prosecution conviction and imprisonment by a federal court, Sec. 3287, Title 26, upon failure to do so. His application for

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the tax stamp (Exhibit 63) and the stamp which the government issued to him by reason of such compulsion could not thereafter legally be used in evidence against him in a state court. *Brown v. Walker,* 161 U. S. 591; 40 L.Ed. 819[1]; *Jack v. Kansas,* 199 U.S. 372; 50 L.Ed. 234; *Feldman v. U. S.,* 322 U. S. 487.

In *Feldman v. United States,* 322 U. S. 487; 88 L. Ed. 1408, this court held that a state statute compelling testimony in a bankruptcy proceeding, that if the statute had been a federal statute that the testimony could not be used. Here we have the reverse situation. The state used evidence which the government compelled. We have a federal statute which makes compulsory the application for a stamp and the issuance of a stamp under penalty of imprisonment. The use of such compelled testimony in the state court thereafter violated petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. It is offensive to the common and fundamental ideas of fairness and right. *Betts v. Brady,* 316 U. S. 455, 462; *Feldman v. U. S.,* 322 U. S. 487; *Boyd v. U. S.,* 116 U. S. 616.

Section 334 of the Penal Code of the State of California provides as follows:

> "No person, otherwise competent as a witness, is disqualified from testifying as such concerning

[1]In *Brown v. Walker,* the Supreme Court thought the likelihood that State prosecutors would use testimony compelled by the Federal Government so "improbable that no reasonable man would suffer it to influence his conduct." 161 U. S. 606-608.

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> the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified."

The instant testimony was obtained from the defendant himself by a federal agency; in the strict sense of the word the documents were "testimony" which the appellant gave to a federal agency under the compulsion of the federal statute. If used thereafter in the state court, it would seem that it either violated due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States or immunity attached under Section 334 of the Penal Code of the State of California, and the judgment herein is void.

In *Boyd v. United States,* 116 U. S. 616, this court condemns the use of evidence unlawfully seized and testimony compelled against an accused as violating those fundamental standards of liberty and justice that inhere in our institutions.

> *Feldman v. U. S.,* 322 U. S. 487;
> *Hebert v. Louisiana,* 272 U. S. 312;
> *Lisenba v. California,* 314 U. S. 219, 86 L. Ed. 166;
> *Malinski v. N. Y.,* 324 U. S. 401;
> *Rochin v. California,* 342 U. S. 165;
> *Harris v. U. S.,* 331 U. S. 158.

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III.

THE SECRET OF MAKING OF A KEY TO APPELLANT'S HOME AND BURGLARIOUS ENTRY INTO THE HOME AND INSTALLATION OF SOUND AND RECORDING DEVICES AND THE TAKING OF TESTIMONY HEARD OVER SUCH APPARATUS, INCLUDING TELEPHONIC CONVERSATIONS, WITHOUT THE CONSENT OF THE RECEIVER OR THE SENDER CONSTITUTES THE OBTAINING OF EVIDENCE BY STANDARDS CONTRARY TO THE FUNDAMENTAL PRINCIPLES OF JUSTICE THAT INHERE IN OUR INSTITUTIONS. THE COURTS MUST PRESERVE THEIR OWN PURITY BY EXCLUDING SUCH EVIDENCE. THE USE OF SUCH EVIDENCE REQUIRES THE REVERSAL OF THE JUDGMENTS BELOW.

The agents of the state secretly made a key to appellant's house; they burglariously entered the home to conduct an operation in violation of California law penalizing wire tapping. Sec. 640 Penal Code of California.) The use of such evidence obtained by these methods is so shocking as to violate the fundamental principles of justice that inhere in our institutions.

Rochin v. California, 342 U. S. 165;
Betts v. Brady, 316 U. S. 455, 462, 473; 86 L. Ed. 1595, 1601, 1607;
Brown v. Walker, 161 U. S. 591; 40 L. Ed. 819;
Boyd v. U. S., 116 U. S. 616;

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Byars v. U. S., 273 U. S. 28;
McNabb v. U. S., 318 U. S. 332; 87 L. Ed. 819;
Feldman v. U. S., 322 U. S. 487.

IV.

THE USE OF EVIDENCE OBTAINED BY METHODS USED BY THE POLICE IN THIS CASE AND THE PROSECUTOR, USING ILLEGALLY OBTAINED AND COMPELLED EVIDENCE, VIOLATES "FAIR TRIAL" GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The use of evidence obtained by interception and listening to telephone conversations in one's private home violates due process of law guaranteed by the Fourteenth Amendment. We are not unmindful of the decision cited by the District Court of Appeals of the State of California, to-wit, *Wolf v. Colorado,* and also the decision of this court in *Schwartz v. Texas,* decided December 16, 1952.

Since this case, however, approaches more nearly the case of *Rochin v. California,* the question involved here is "how low can the police get in their administration of justice."

In *Rochin v. California, supra,* the officers pumped the stomach of the accused. In this case they burglarized his house. They had a man make a key to the house surreptitiously while the owner was away. Then

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they entered the house for the purpose of violating Section 640 of the Penal Code of the State of California, to-wit, tapping phones and telegraph wires. They faked an arrest and then they spread powder upon the documents and books and papers of another man. Then they broke into the house without any warrant and compelled the appellant and defendant to exhibit his hands to them.

To permit the use of this kind of evidence is to condone burglary and other lawless tactics and "dirty business" on the part of the officers, see *On Lee v. U. S.*, L. ed. Adv. 770 and *Schwartz v. Texas 21*, L. W. 4055.

In *Sorrells v. United States*, 287 U. S. 435, this court said: "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is a province of the court and the court alone to protect itself and the government from the prostitution of the criminal law."

And, in *Olmstead v. United States*, 277 U. S. 438, 484, Justice Brandeis said, "Our government is the potent, the omnipresent, teacher, for good or for ill, it teaches the whole people by its example." Are we then going to permit such lawless practices to receive the approval of the Supreme Court of the United States, or is this court going to hold that due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States forbids such practices as this?

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Chambers v. Florida, 309 U. S. 227;
Rochin v. California, 342 U. S. 165;
Sorrells v. United States, 287 U. S. 435.

To paraphrase the language of this court in *Rochin v. California, supra,*

> The "conduct (in this case burglary and other misconduct) . . . the judgment before us would be to afford burglary and other lawless conduct of the officers of the law the cloak of law. Nothing would be more calculated to discredit law and thereby to utilize the temper of a society." (342 U. S. 165.)

Such conduct on the part of the officers is "so offensive to human dignity in securing evidence from a suspect as is revealed by this record" as to be forbidden by the Fourteenth Amendment to the Constitution of the United States and its use ostracized.

WHEREFORE, appellant prays that a Writ of Certiorari issue out of this Court to the District Court of Appeal of the State of California, Second Appellate District, Division Two, and that the judgments below be reversed.

Respectfully submitted

Morris Lavine

Wire tapping in obtaining information over the telephone is a felony under the state laws of the State of California. (Sec. 640 Penal Code, State of California.)

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. .....

PATRICK E. IRVINE,
Defendant and Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee.

COMES NOW Patrick E. Irvine, a citizen of the United States, and moves this Honorable Court for leave to proceed upon the typewritten record on his petition and consideration of a Writ of Certiorari, for the following reasons:

1. That the record is quite long, consisting of 995 pages, and the costs of printing the record to this appellant would therefore be so great as to be prohibitive of his right to a hearing on a writ of certiorari. He has raised several important federal questions which have not been, but should be, determined by this Honorable Court.

2. The plain facts upon which the petition is based are undisputed, namely that the petitioner had taken out a federal wagering stamp on an application for

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federal stamp tax, pursuant to the act of the 82nd Congress adding Section 3285,-3287 to Title 26, U. S. Codes, and that the State has by this arrest sought to defeat and impede the tax.

3. Three police officers of the City of Long Beach surreptitiously had a key made to the appellant's home, entered the home without his consent, installed listening devices within it, and thereafter recorded several telephone conversations in violation of Section 640 of the Penal Code of the State of California, and Section 605 of Title 47, U. S. Codes. That they surreptitiously spread powder upon books and papers and thereafter required the petitioner to exhibit his person (in his home) for the purpose of obtaining evidence used in the trial of the case to convict him.

4. The appellant throughout the trial raised the federal questions involved herein which are important to be settled in the administration of justice.

WHEREFORE, petitioner prays that he be allowed to proceed upon the typewritten record upon appeal on the Petition for Certiorari.

Morris Lavine
Attorney for Petitioner.

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No. 12

IN THE

SUPREME COURT

OF THE

United States

PATRICK E. IRVINE,
Defendant and Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee.

APPELLANT'S OPENING BRIEF

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IN THE

SUPREME COURT

OF THE

United States

PATRICK E. IRVINE, *Defendant and Appellant,* vs. PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Appellee.*	No. 12

APPELLANT'S OPENING BRIEF

OPINION BELOW

Opinion Below is found in 248 Pac. (2d) 502 and in 113 Cal. App. (2d) 460 and is also contained on page 964 of the record of this Court and also on page 983 of the record.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, of the Constitution of the United States expressly confers on Congress the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

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Fourteenth Amendment to the Constitution of the United States, provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Title 26, Section 3285 of the Internal Revenue Code, provides as follows:

> "§3285. Tax.
>
> (a) Wagers. There shall be imposed on wagers, as defined in subsection (b), and excise tax equal to 10 per centum of the amount thereof.
>
> (b) Definitions. For the purposes of this chapter—
>
> (1) The term 'wager' means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.
>
> (2) The term 'lottery' includes the numbers game, policy, and similar types of wagering. The

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term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) and drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager

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placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

(f) Territorial extent. The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States. Oct. 20, 1951, 2:07 p. m. E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529."

Title 26, Section 3287 of the Internal Revenue Code, provides as follows:

"§3287. Certain provisions made applicable.

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax imposed by this subchapter. In addition to all other records required pursuant to section 2709, each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable. Oct. 20, 1951, 2:07 p. m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529."

Section 337a, subdivisions 1, 2, 3, 4, and 5, of the Penal Code of the State of California, provides as follows: Every person,

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"1. Who engages in pool-selling or book-making, with or without writing, at any time or place; or

2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or best, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing, or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the

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result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

5. Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, inclosure or grounds or any part thereof whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivisions 1, 2, 3 or 4, of this section; or . . .

Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive. [Added by Stats. 1909, p. 21; Am. Stats. 1911, p. 4.]"

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Section 334 of the Penal Code of the State of California, provides as follows:

> "§334 [Incrimination]: Witness' privilege. No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified. [Enacted 1872.]"

Section 640 of the Penal Code of the State of California, is as follows:

> "§640 [Tapping or unauthorized connection with telegraph or telephone line; Interception of communications and use of information so obtained; Aiding or conspiring to tap line: Punishment.] Every person who, by means of any machine, instrument, or contrivance or in any other manner, wilfully and fraudulently, or clandestinely taps, or makes any unauthorized connection with any telepgraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company; or who wilfully and fraudulently, or clandestinely, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any telegraph or telephone wire, line, or cable, or is being sent from or received at any place within the state; or who uses,

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or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained; or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things hereinabove mentioned, is punishable as provided in section 639. [Enacted 1872; Am. Stats. 1905, p. 691; Stats. 1915, p. 210.]"

639. [*Employee using information contained in telegraphic or telephonic messages: Punishment.*] Every agent, operator or employee of any telegraph or telephone office, who in any way uses or appropriates any information derived by him from any private message passing through his hands, and addressed to any other person, or in any other manner acquired by him by reason of his trust as such agent, operator, or employee, or trades or speculates upon any such information so obtained, or in any manner turns, or attempts to turn, the same to his own account, profit, or advantage, is punishable by imprisonment in the state prison not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment.

Section 459, California Penal Code:

459 (Burglary defined):

"Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the

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Vehicle Code, vehicle as defined by said code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. (Enacted 1872; Am. Code Amdts. 1875-76; p. 111, Stats. 1913, p. 228; Stats. 1947, ch. 1052, §1.)"

Title 47, Section 605, as follows:

"§605. Unauthorized publication or use of communications. No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any

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interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, §605, 48 Stat. 1103.)"

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JURISDICTION

Jurisdiction is conferred by Title 28, Sections 2101-4, Title 28, Section 1257, and Rule 38½ of the Rules of the Supreme Court of the United States. Petition For Certiorari was granted by this Court on the 6th day of March, 1953. (73 Sup. Ct. Rep. 646.)

STATEMENT OF THE FACTS

On November 5, 1951, Patrick E. Irvine, the appellant, applied for and obtained a special wagering stamp from the Department of Internal Revenue of the United States and the Tax Division thereof, for which he paid the sum of fifty dollars. (R. 133.) He made his formal application for the stamp, filled out the form required by law to be filled out, and gave it to the Tax Division which issued the stamp to him. Following this procedure, the state authorities employed Russell D. Mason (R. 18) to install microphones and electric devices on behalf of the City Police Department of the City of Long Beach into his private dwelling or home and to attach a recording machine thereto which led to a garage about eight hundred feet distant from the home.

The police hired a keysmith to figure out and secretly make a duplicate key for one of the doors to appellant's residence at 3916 E. 2nd Street in the City of Long Beach, California, which was the home of the appellant and his wife, Mildred.

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The police strung wires from the Irvine home on East Second Street to about seven or eight hundred feet distant to the garage, where a microphone and recording device was installed. They entered the house secretly and without any search warrant or any other legal process with the key previously made from an impression taken from the lock of the front door of Irvine's home without the knowledge or consent of Irvine, to install the microphone and listening device and then, thereafter, while the appellant was away, they secretly entered twice after that and changed the microphone, both on December 8th and on December 28th, 1951, because of interference from a fluorescent lamp which made the hearing over the recording device very difficult (R. 135).

After the microphone had been installed, Mr. Mason, together with police officers Calori, Gautt, Hermansen, Kennedy and Jacobsen were detailed to work at stated hours in the garage with the amplifier and to listen to conversations which they heard and desired to have recorded and to use for the benefit of the people of the State of California and the City of Long Beach, to prosecute the defendant. Through the secret listening device it was discovered that Mr. Lippe, another defendant, was entering the defendant's home and that he also returned to a building in Los Alamitos, Orange County, 19851 Chestnut Street, in that city, where he had two phones and various alleged bookmaking apparatus and paraphernalia.

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Through the installed devices, at Mr. Irvine's private home, the officers listened in on telephone conversations in which they would hear Mr. Irvine dial the telephone and then call what they denominated as bets to some person on the other end of the phone, referring to that person on such occasions as "Jamoke" who it was asserted is a nickname for Mr. Lippe. On various occasions they heard Mrs. Irvine call out bets on the horse races, naming the track and the horses and the amounts of bets taken which were related in the phone conversations. After several weeks of listening to and recording the telephone conversations, and other conversations, on January 5, 1952, by pre-arranged plan, having learned the streets that were driven on these trips back and forth, it was agreed among the officers that Mr. Jacobsen would obtain a quantity of fluorescent powder which is invisible ordinarily and is not visible at all unless and until subjected to an ultra-violet ray lamp. It was further agreed that they would stage a pretended road block when Pete Curti was making his trip back to Mr. Irvine's home and as part of that plan Mr. Gautt, one of the officers who had been working on this case at the garage was a decoy. He was to be stopped, then have his stopped automobile searched as though someone had just committed a holdup over in Garden Grove and that vicinity. It was further suggested that Mr. Gautt was to get his automobile directly in front of Pete Curti's automobile so that when he was stopped the Curti automobile would be stopped directly behind

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him. There were motorcycle officers there to stop both persons, none had any search warrants or any lawful right to make the stop. Mr. Gautt was compelled to get out of his car and hold up his hands for a search and a gun was found in the waistband of his trousers and the gun was taken and he was told to get in the car. Directly behind the car was Mr. Curti's car and in the car with him at that time was Audie Greer. The same idea was carried out by officers there. They were told a hold-up had just been perpetrated and it was a similar car in which Mr. Curti was riding. Mr. Curti and Audie Greer got out of the car and there were a number of papers, and other articles alleged to be betting markers partly concealed under the coat of Audie Greer which she held in her hand and which she was directed to place everything back in the car. The officers being in uniform at that time she laid these things down on the seat of the car and while pretending to search the car Mr. Jacobsen with a fluorescent powder all over his hands, pawed through the papers and pretended to look for guns and impregnated all of the papers with the fluorescent powder. Some of the papers were taken from the shirt pocket of Mr. Curti which were perfunctorily examined and also impregnated with the fluorescent powder and given back to him and they were permitted to go on their way. A short time later after they had gone to the home of Mr. Irvine, officers entered, and placed Mr. Irvine under arrest. In his desk and about his desk in addition to many things, they asserted that they had found these same

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papers with the same fluorescent powder on them and they were subjected to the ultra-violet ray test in the presence of Mr. Irvine. They compelled him to exhibit his hands under a fluorescent lamp. They also put the ultra-violet light upon his hands and there was fluorescence all over his hands, so they asserted. These papers it was alleged were betting markers. No search warrant was obtained in accordance with Title 12, Chapter 3 of California Penal Code, to enter his home nor to search or take the papers seized.

The appellant was convicted of violation of Section 337A subdivisions 1, 2, 3 and 4 of the Penal Code of the State of California (R. 110, 111, 112 and 113) as alleged in Counts II, III, IV and V of the information (R. 1 to 4).

The number of the stamp tax was set out in the information or charge against the petitioner which was filed by the State (R. 1). During the course of the trial the application for a stamp and the stamp tax itself which were obtained by him pursuant to law were used against him to convict him by the State of California which it as evidence of an unlawful operation.

Early in the trial in the Superior Court for the State of California for the County of Los Angeles at Long Beach, California, where the case was tried, the appellant that he could not be prosecuted by the state because he had already obtained his stamp from the Federal Government and that the State therefore had no right to prosecute him (R. 242-247).

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The appellant also raised the point that installation of the microphone in his home without any search warrant or other process and thereafter recording telephone conversations constituted a violation of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, in that the evidence was illegally obtained in violation of due process of law and also consisted of recordings of telephone conversations without the consent of either the receiver or the sender of the conversations. That these violated his rights under the federal constitution. (R. 244-247).

There was a standing objection throughout the trial based upon these contentions and although frequently the objections were repeated, the court overruled all objections and permitted the objection to go to all the proceedings. (R. 247).

It was also pointed out and made a part of the objection that wire tapping in the State of California is forbidden by Section 640 of the Penal Code and therefore the use of such wire tapping evidence constituted a violation of due process of law guaranteed by the Fourteenth Amendment.

Following the overruling of the objections, the court permitted conversations had over the wire recorded and heard over the telephone to be received in evidence against the appellant. (R. 249, et seq.). Thus telephone conversations which were heard over the installed wire recording are listed on page 363 of the Record:

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"A. I heard the sound of a 'phone being dialed. I heard Mr. Irvine's voice.

Q. Very well.

A. I heard Mr. Irvine say 'Can I speak to Jamok'? Then I heard Mr. Irvine say, 'In the first place you've got the horse down wrong.' Then I heard him say, 'In the 8th, 2 to win.' Then I heard him say 'King's Boy, 2 to win. In the fourth, Handy Display. In the fifth, Limbo Junior, 2 to win. I've got some more for you. In the third, Clam Digger.' And I heard him say the word 'Fair Grounds.' And that is all of that particular conversation I recall at this time." (R. 363).

On December 11th he again recorded a phone conversation. (R. 364):

"I heard the sound of a 'phone being dialed and I heard Mr. Irvine say, 'How you doing, Tony?' Then there was a pause. Then I heard Mr. Irvine's voice say, 'Here's a parlay, 1-7, 2 across.' And '47-58-68-73-84-57-65-88.' Then '16 - 51 - 1 - across parlay.'"

Other conversations are recorded on pages 365, 366 and 367, 384. The conversation of December 29th:

"I heard Mr. Irvine—I heard a 'phone being dialed. I heard Mr. Irvine say, 'How're you doing, Pete?" I heard him say, 'Tropical, 37, 64, 9.11, 96, one and one criss-cross. Whitman, one to place, criss-cross.' Then I heard him say, 'You made a mistake on Nelson. You paid him 7.20 for the $5

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he bet and that 7.20 was payment for only $2.' " (R. 384).

Other conversations are recorded on pages 385, 386 and 387.

On December 2nd, the police took a key-man to the home of Mr. Irvine to have a skeleton key made of the premises. (R. 642). They gave him nothing to guide him, just asked him to make a key and he pushed into the lock to locate the tumblers and then filed the key until it opened the lock. (R. 643). He made the key on the front porch of Irvine's home, but without Irvine's consent. (R. 643). The officers, Inspector Kennedy and Officer Hermansen, got the key the following day. (R. 644). They walked into the house through the key they stealthily got, looked around at papers and things. (R. 646, 647). They examined the papers in the house under fluorescent light. (R. 649). They demanded Irvine to come over and put his hands under the light; he walked over and put his hands underneath the ultra violet light. (R. 650, 651). There was a reaction on his hands when he put them underneath the light. There was a search made of the house (without any search warrant or any other process by the officers). (R. 653). In the house they found the government issued wagering stamp belonging to Morris Lippe. (R. 654). In the bedroom they saw a racing form and 46-sheets of paper and a little note book. (R. 655). In Mr. Irvine's room there was a book with a list of telephone numbers. They took pictures of the

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bedroom and pictures of the place. They searched the place and picked up books, papers and paraphernalia and several things which were introduced into evidence as Exhibits 22 et seq.

At the trial Leonard Hermansen related overhearing on a loud speaker and recording on his listening device a conversation. On December 8, 1951, on the telephone [Rep. Tr. p. 235, lines 11-22;] a telephone conversation on December 11, 1951, [Rep. Tr. p. 236, line 21 to p. 237, line 7;] December 12, 1951, [Rep. Tr. Vol. I, p. 241, lines 11-21;] December 13, 1951, [Rep. Tr. Vol. I, p. 243, line 7, to p. 244, line 2;] December 15, 1951, [Rep. Tr. Vol. I, p. 247, lines 7-17] December 17, 1951, [Rep. Tr. Vol. I, p. 248, line 25, to p. 249, line 8;] December 26, 1951, [Rep. Tr. Vol. I, p. 252, lines 15-24;] December 29, 1951, [Rep. Tr. Vol. I, p. 255, line 24, to p. 256, line 25;] December 29, 1951, [Rep. Tr. Vol. I, p. 256, lines 15-23;] December 29, 1951, [Rep. Tr. Vol. I, p. 257, line 16, to p. 258, line 18;] December 31, 1951, [Rep. Tr. Vol. I, p. 259, lines 3-18;] December 31, 1951 [Rep. Tr. Vol. I, p. 260, lines 1-7;] January 5, 1952, [Rep. Tr. Vol. I, p. 265, lines 14-23.]

The following witnesses related conversations alleged to have been overheard over the secretly installed listening device as emanating from Appellant's apartment:

Leonard Hermansen related a conversation he heard between Appellant and Pete Curti, [Rep.

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Tr. p. 229, line 11, to p. 231, line 15.] on December 11, 1951, a conversation between Appellant and Lippi [Rep. Tr. Vol. 1, p. 237, line 8 to p. 240, line 20;] on December 12, 1951, between Appellant and Lippi; [Rep. Tr. Vol. 1, p. 242, lines 15-19;] on December 17, 1951, between Appellant and Lippi; [Rep. Tr. Vol. I, p. 250, line 20, to p. 251, line 19;] on December 27, 1951, between Appellant and Pete Curti, [Rep. Tr. Vol. I, p. 254, line 20, to p. 255, line 4;] on December 31, 1951, a conversation in which he alleged he heard Pete Curti speak, [Rep. Tr. Vol. I, p. 260, line 18, to p. 261, line 12;] on January 2, 1952, a conversation between Appellant and Pete Curti, [Rep. Tr. Vol. I, p. 261, line 24, to p. 263, line 13.]

Jack D. Calori related a conversation he overheard through the listening device between Appellant and Morris Lippi emanating from the home of Appellant on December 4, 1951, [Rep. Tr. Vol. I, p. 110, line 20; p. 112, line 7; p. 115, line 26, to p. 116, line 8; p. 118, line 22, to p. 119, line 14.]

The microphone in the petitioner's house was removed on January 5th. (R. 667). A wagering stamp was found in a drawer of Irvine's home. (R. 668).

Frederick L. Good, a police officer of the City of Long Beach testified that on the night of January 5th, he took a special tax stamp, wagering, bearing the name apparently in typewriting "Irvine, Patrick E." and the address 3916 East Second Street, Long Beach, California, wager 28506, November '51 and then bearing a

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date, 11/5/51, which was marked as People's Exhibit 36. (R. 690). He said he took it from the wallet of the defendant, Patrick Irvine in the city jail on the night of January 5, (R. 690). There was also on the stamp tax the sum of $50.00. There was an objection to the introduction of the stamp in evidence because it was obtained in compliance with the federal law and therefore could not constitute an illegal act and can't be used to prove an illegal act of the state. (R. 691-692). This objection was overruled. (R. 692).

There was also introduced in evidence over objection the photostat of an original application, dated October 31, 1951, of Patrick E. Irvine to the Head of the Wage and Excise Tax Division of the United States Government, which constituted an application and report in a government report issued by the government regarding the application. (R. 854). The objection was overruled. (R. 855).

The court permitted in evidence all of the exhibits 63 to 74 from the records of the Office of the Collector of Internal Revenue. (R. 864). Exhibit 63 is the application of Patrick E. Irvine, the petitioner herein.

Objection to the installation of the microphone in the home of the appellant and the obtaining of testimony in that manner was objected to as a violation of due process of law (R. 922) and as using standards forbidden in the case of *Rochin v. People of the State of California* on motion for a new trial (R. 922) which motion was denied. (R. 922).

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The appellant was sentenced to one year in the county jail on Count II, (R. 946), six months in the county jail on Count III and the sentence to be suspended on the condition that he pay a fine of $1500.00 or to run consecutively with Count II; six months in the county jail on Count IV, suspended, and six months in the county jail on Count V, suspended. If the fine is not paid the six months is to run consecutively with the year's sentence. (R. 947).

The trial judge gave the following instructions to the jury.:

> "You are instructed that you are to consider all evidence which the Court has permitted to be introduced for your consideration, irrespective of the manner by which such evidence has been obtained, and to give to all of such evidence the weight to which you shall find it to be entitled.
>
> "The above instruction refers specifically to the testimony tending to prove that a microphone was placed in the home of defendant Patrick E. Irvine without the knowledge or consent of either the said Patrick E. Irvine or his wife, Mildred Irvine, and then connected by a wire to a distant point where it has been testified a recording machine and a loud speaker were installed and voices originating in the home of defendant Irvine were allegedly heard over the loud speaker and recorded on the recording machine. Such evidence (if you find that it was so obtained) is legally admissible in this State the same as any other competent evidence." (R. 42).

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"You are instructed that any trespass which you may find to have been committed upon the property of the defendants, or any of them, is not to enter into your deliberations in weighing the guilt or innocence of these defendants or to be considered by you in any manner whatsoever. That is a matter in which defendants have a separate remedy at law but which has no part in this trial. It is your duty to consider only the evidence which has been admitted for your consideration and determine from such evidence whether the guilt of defendants, or any of them, has been proved, and render your verdict accordingly." (R. 35).

"You are instructed that, effective November 1, 1951, Federal Laws require that every person who engages in the business of accepting wagers on horses or on any other sporting event, is required to make application to the Collector of Internal Revenue for a wagering stamp, which stamp must at all times be kept at the place of business of such person, or if he have no place of business, carried at all times on his person. Such person shall make monthly reports to the Collector of Internal Revenue showing the business he has done for the previous month and pay a tax on such amount, less any credit for so-called 'lay off' bets, that is, as defined by Federal law, bets received from another person engaged in accepting bets who has paid or reported such 'laid off' amounts himself.

Such Federal laws also provide that an individual may be primarily engaged in business as a salesman or merchant, for example, and if in addition to such regular business he accepts bets for

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profit, he shall be deemed to be engaged in the business of accepting wagers. Whether a person accepts bets for himself alone or for others, he is required to purchase the wagering stamp and pay the tax imposed.

However, none of the defendants is here being charged with violation of any Federal laws, but only for the specific crimes described and charged in the information filed by the District Attorney.

You are further instructed that the payment of any tax imposed by the Internal Revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of this State for carrying on the same within this State or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of this State. The special tax stamp is not a license or permit and affords no protection from prosecution for violation of any Federal or State Law." (R. 72, 73).

The appellant appealed to the District Court of Appeal for the State of California, Second Appellate Department, Division Two, which sustained the judgment of the trial court as against the contention that the rights of the petitioner under the Constitution of the United States had been violated and held that he had not been denied rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. (R. 968, 969).

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The petition for hearing in the Supreme Court of the State of California was denied on October 30th, 1952, in which the rights under the Federal Constitution were again reasserted, (R. 979, 980, 981), and the Supreme Court of California denied the hearing, two justices however were of the opinion that the petition for hearing should be granted—Justices Carter and Schauer. (R. 990).

QUESTIONS PRESENTED

I.

Whether the Wagering Stamp Tax provided for by an Act of Congress may be nullified and defeated by state officers arresting a person so taxed and thus licensed. Whether the trial judges instructions to the jury to the contrary was error.

II.

Whether a State may take advantage of the fact that the Federal Government taxes a person on the presumption that the tax is upon a lawful occupation to use that fact as compelled evidence against a person under a state law to prove he was in an unlawful occupation and thus convict him of a state crime on the basis of evidence which he has been compelled to give by reason of a Federal Statute; and whether conviction based upon such evidence violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

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III.

Whether the use of such compelled evidence grants Appellant statutory immunity under Section 334 California Penal Code.

IV.

Whether the method used by the police in this case of secretly having a locksmith make a key to appellant's home and thereafter entering it and installing a microphone and thereafter installing listening devices and obtaining evidence of telephonic and other conversations in the home violate those fair and fundamental standards of justice consonent with due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V.

Whether a fair trial has been had in this case where evidence obtained by compulsion of a Federal Statute and obtained by burglary into appellant's home and in violation of fundamental rights constitutes a fair trial within the meaning of the Fourteenth Amendment to the Constitution of the United States.

VI.

Whether the trial Judge's instructions to ignore the "trespass" and the instruction regarding the Federal Stamp tax were error.

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SUMMARY OF PROPOSITION RELIED UPON

This case involves fundamental questions of constitutional law: namely,

A State may not through its criminal laws defeat and extinguish a federal tax passed by Congress and the opportunity to continue collecting such tax.

An Act of Congress imposing a tax cannot be impaired by State law or by State officers.

A defendant may not be tried and convicted in the State courts upon evidence obtained by compulsion of a Federal Statute, and thereafter introduced in evidence against an accused in the State court.

Compelled evidence under the Federal Statute within the meaning of the Fifth Amendment to the Constitution of the United States cannot be used in a state court without violating the Fourteenth Amendment to the Constitution of the United States. If such evidence is used in a state having an immunity statute such as Section 334 California Penal Code the effect is to grant statutory immunity.

Evidence obtained by burglarious entry of the police into the home of the appellant and by listening devices thereafter installed and recordings of telephone conversations through those listening devices and used in the trial of the appellant against him constitute such uncivilized standards as to violate the due process clause of the Fourteenth Amendment to the

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Constitution of the United States? They also violate Title 47, Section 605, F.C.C. Act, and Sec. 640 California Penal Code.[1]

Under the facts and circumstances of this case the appellant has been deprived of a fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States.

I.

Congress had a constitutional right to fix the wagering tax toward paying for the national debt. When Congress, by Title 26, Section 3265-3267 (65 Stat. 529), passed the act fixing a tax upon wagering throughout the United States the state could not interfere with or interrupt the federal tax by arresting the purchaser and terminating his use of the stamp. The person upon obtaining such a stamp and paying the tax was entitled to carry on wagering without interference from state authorities. A state may not interfere with a federally imposed tax by molesting and arresting the person paying such tax and thereby defeating the tax and its future collections. If it could do it in this case it could do it in any case.

Congress in fixing such a tax did so upon the theory that it was imposing a tax upon a legal operation—not an illegal operation.

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[1] Use of connected listening or recording apparatus is an "interception" within the prohibition of the Communications Act.
U. S. v. Polakoff, 112 F. (2) 888; Cert. denied U. S. 653;
U. S. v. Fallon, 112 F. (2) 894 Cert. denied 311 U. S. 653.

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II.

Where all persons engaged in the business of wagering are compelled by a law to make a declaration thereof and pay the tax and can be convicted upon the basis of evidence obtained by such compulsion under federal statutes, the use of such evidence in a state court constitutes a violation of due process of law guaranteed by the Fifth and incorporated into the Fourteenth Amendment to the Constitution of the United States.

III.

Where the State of California used such compelled testimony it automatically granted statutory immunity under Section 334, California Penal Code. The defendant's testimony by means of his own voice, recorded on the secret listening devices and recording machines also gave him statutory immunity under Sec. 334 California Penal Code.

IV.

The secret making of a key to appellant's home and burglarious entry into the home and installation of sound and recording devices and the taking of testimoney heard over such apparatus, including telephonic conversations, without the consent of the receiver or the sender and in violation of Section 640 of the California Penal Code and Article I, Section 19 of the California Constitution constitutes the obtaining of evidence by standards contrary to the fundamental

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principles of justice that inhere in our institutions. It represents a new low in law enforcement which the courts must reject to preserve its own purity. The use of such evidence requires a reversal of the judgments below.

V.

The use of evidence obtained by methods used by the police in this case and the prosecutor, using illegally obtained and compelled evidence, violates "fair trial" guaranteed by the Fourteenth Amendment to the Constitution of the United States, and is as shocking as was the obtaining and use of stomach pumped evidence rejected by this court in *Rochin v. California.*

VI.

The Court should re-examine and reverse *Schwartz v. Texas.* Sec. 605 of Title 47 is not a rule of evidence for the courts but a general statute forbidding all interception and use of telephone conversation. California has a similar statute. See 640 California Penal Code.

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ARGUMENT

I.

CONGRESS HAD A CONSTITUTIONAL RIGHT TO IMPOSE THE WAGERING TAX, ARTICLE I, SECTION 8, U. S. CONSTITUTION. McCRAY v. U. S., 195 U. S. 27. WHEN CONGRESS, BY TITLE 26, SECTION 3285, 3287, PASSED AN ACT FIXING A TAX UPON WAGERING THROUGHOUT THE UNITED STATES, THE PERSON UPON OBTAINING SUCH A STAMP AND PAYING THE TAX WAS ENTITLED TO CARRY ON WAGERING WITHOUT INTERFERENCE FROM STATE AUTHORITIES. A STATE MAY NOT INTERFERE WITH OR DEFEAT A FEDERALLY IMPOSED TAX BY MOLESTING AND ARRESTING THE PERSON PAYING SUCH TAX AND THEREBY DEFEATING THE TAX AND ITS FUTURE COLLECTIONS. CONGRESS IN FIXING SUCH A TAX DID SO UPON THE THEORY THAT IT WAS IMPOSING A TAX UPON A LEGAL OPERATION—NOT AN ILLEGAL OPERATION.

On October 20th, 1951 the federal law regarding wagering stamps went into effect. On November 5th, the appellant pursuant to the commands of congress applied for and obtained such a wagering stamp. Had he failed to do so, he would have been guilty of a federal crime.

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It must be presumed that Congress intended to tax a lawful operation, and that it did so to collect money to pay the national debt.

Article I, Section 8, of the Constitution of the United States expressly confers on Congress the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United State."

These purposes are very broad. The motive or purpose of Congress in levying the tax may not be inquired into by the courts.

> *McCray v. United States*, 195 U. S. 27, 49 L. Ed. 78, 1 Am. Cas. 561.

Having power to raise money to pay the debts of the United States, it of course follows that Congress has power to tax and make lawful operations that might even be deemed unlawful within the States. Since the rights are created for federal purposes a state may not though any of its agencies impair the federal tax. The United States has priority of the necessary consequence of the supremacy of the Laws of the United States on all subject to which the legislative power of Congress extends.

> *United States v. Fisher*, 2 Cranch. 358, 2 U. S. (L. Ed.) 304;
> *U. S. v. Darby*, 312 U. S. 100;
> *Opp Cotton Mill, Inc. v. Administrator*, 312 U. S. 144.

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No state may as an exercise of its own power lay any burden on the taxing power or impede the taxes imposed by the United States. (*Dobbin v. Erie County,* 16 Fed. 435, 10 U. S. (L. Ed.) 1022).

And see *McCulloch v. Maryland,* 4 Wheat. 316, 5 U. S. (L. Ed.) 579; *Williams v. Callacega,* 57 U. S. (L. Ed.) 275; *Farmers, etc. Savings Bank v. Minnesota,* 232 U. S. 516, 58 L. Ed. 706; *Choctaw etc. Railroad Co. v. Harrison,* 235 U. S. 292, 59 L. Ed. 234.

The framers of the Constitution did not design to make the federal government dependent upon the states.

> *McCulloch v. Maryland,* 4 Wheat. 316, 5 U. S. (L. Ed.) 579.

Nor are states allowed to defeat federally imposed taxes.

Exclusive jurisdiction is given to the federal government in this matter.

> *Yates v. Jones National Bank,* 206 U. S. 158, 51 L. Ed. 1002;
> *Easten v. Iowa,* 188 U. S. 220, 47 L. Ed. 452;
> *Cross v. North Carolina,* 132 U. S. 131, 33 L. Ed. 287;
> *In re Eno,* 54 Fed. 669;
> *U. S. v. Busbee,* 38 Fed. 99.

The priority given the United States cannot be impaired or superseded by state law. *U. S. v. Oklahoma,*

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261 U. S. 253, 260; *Illinois v. Campbell,* 329 U. S. 362, 370, 91 L. Ed. 355.

It is well settled in the case of banks that the power of Congress subjects these national banks to the paramount authority of the United States. That an attempt by a state to define their duties or control the conduct of their affair is absolutely void, and the only power of the states in respect thereto is only when it is specifically granted by Congress.

Owensborough National Bank v. Owensborough, 173 U. S. 664, 43 L. Ed. 850;
Veazie Bank v. Fenno, 8 Wall. 533, 19 U. S. (L. Ed.) 482;
Farmers Etc. Nat'l Bank v. Erie, 91 U. S. 29, 23 L. Ed. 196.

Once Congress has assumed to tax "wagering", nationally under its Constitutional power, a State may not interfere to diminish or defeat the tax without specific consent of Congress, which has not been given. There is no difference between this situation and federal taxation and jurisdiction regarding federal banks.

One who complies with the Federal Statute and obtains his wagering stamp may thereafter not be interfered with by the state authorities because it would thereafter defeat and impair the tax. Action by a state in the exercise of its police powers must, by virtue of the supremacy clause, Article VI, Clause 2, U. S. Constitution, give way to the act of Congress. *Brod-*

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erick v. Rosner, 294 U. S. 629; 79 L. Ed. 1100; *Morris v. Jones,* 329 U. S. 553; 91 L. Ed. 497.

The power of the state "may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'." *Hill v. Florida,* 325 U. S. 538, 542; 89 L. Ed. 1782, 1785; *Maurer v. Hamilton,* 309 U. S. 598; *Bethlehem Steel Co. v. N. Y. Labor Rel. Bd.,* 330 U. S. 773; 91 L. Ed. 1245-6; and see *Feldman v. U. S.,* 322 U. S. 490-3.

II.

A.

WHERE ALL PERSONS ENGAGED IN THE BUSINESS OF WAGERING ARE COMPELLED BY A LAW TO MAKE A DECLARATION THEREOF AND PAY THE TAX AND CAN BE CONVICTED UPON THE BASIS OF EVIDENCE OBTAINED BY SUCH COMPULSION UNDER FEDERAL STATUTES, THE USE OF SUCH EVIDENCE IN A STATE COURT CONSTITUES A VIOLATION OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

B.

BY ITS USE STATUTORY IMMUNITY IS GRANTED UNDER SECTION 334 CALIFORNIA PENAL CODE.

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A.

The federal statute regarding "wagering tax and stamps" was compulsory. The appellant was compelled to apply or subjected himself to prosecution, conviction and imprisonment by a federal court, Sec. 3287, Title 26, upon failure to do so. His application for the tax stamp (Exhibit 63) and the stamp which the government issued to him by reason of such compulsion could not thereafter legally be used in evidence against him in a state court. *Brown v. Walker,* 161 U. S. 591; 40 L. Ed. 819[1]; *Jack v. Kansas,* 199 U. S. 372; 50 L. Ed. 234; *Feldman v. U. S.,* 322 U. S. 487.

In *Feldman v. United States,* 322 U. S. 487; 88 L. Ed. 1408, this court held that a state statute compelling testimony in a bankruptcy proceeding, that if the statute had been a federal statute that the testimony could not be used. Here we have the reverse situation. The state used evidence which the government compelled. We have a federal statute which makes compulsory the application for a stamp and the issuance of a stamp under penalty of imprisonment. The use of such compelled testimony in the state court thereafter violated petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. It is offensive to the common and fundamental ideas of fairness and right. *Betts v.*

[1]In *Brown v. Walker,* the Supreme Court thought the likelihood that State prosecutors would use testimony compelled by the Federal Government so "improbable that no reasonable man would suffer it to influence his conduct." 161 U. S. 606-608. But it did happen here.

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Brady, 316 U. S. 455, 462; *Feldman v. U. S.*, 322 U. S. 487; *Boyd v. U. S.*, 116 U. S. 616.

In *Boyd v. United States*, 116 U. S. 616, this court condemns the use of evidence unlawfully seized and testimony compelled against an accused as violating those fundamental standards of liberty and justice that inhere in our institutions.

Feldman v. U. S., 322 U. S. 487;
Hebert v. Louisiana, 272 U. S. 312;
Lisenba v. California, 314 U. S. 219, 86 L. Ed. 166;
Malinski v. N. Y., 324 U. S. 401;
Rochin v. California, 342 U. S. 165;
Harris v. U. S., 331 U. S. 158.

B.

Use of this testimony resulted in granting statutory immunity under Sec. 334 California Penal Code.

Section 334 of the Penal Code of the State of California provides as follows:

> "No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified."

The instant testimony was obtained from the defendand himself by a federal agency; in the strict sense of

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the word the documents were "testimony" which the appellant gave to a federal agency under the compulsion of the federal statute.

If used thereafter in the state court, it either violated due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States or immunity attached under Section 334 of the Penal Code of the State of California, and the judgment herein is void, and the defendant is entitled to his discharge.

Having used the compelled testimony against him the defendant thereby received statutory immunity under Section 334 California Penal Code and is entitled to his discharge.

Section 334 California Penal Code;
Smith v. U. S., 337 U. S. 137; 93 L. Ed. 1264;
Ex parte Clark, 103 Cal. 352;
People v. Knowles, 27 Cal. App. 498;
People v. Fryer, 175 Cal. 785;
Ex parte Cohen, 104 Cal. 524;
Counselman v. Hitchcock, 142 U. S. 547.

Section 334 California Penal Code is designed to afford immunity to a person for his testimony in gambling or wagering matters similar to the Compulsory Testimony Act of Feb. 11, 1893; 49 U.S.C.A. Sec. 46 F.C.A. Title 49 Sec. 46.

See:

Counselman v. Hitchcock, 142 U. S. 547; 35 L. Ed. 1110;

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Brown v. Walker, 161 U. S. 591; 40 L. Ed. 819;
Glickstein v. U. S., 222 U. S. 139; 56 L. Ed. 128;
Burrell v. Montana, 194 U. S. 572; 48 L. Ed. 1122;
Jack v. Kansas, 199 U. S. 372; 50 L. Ed. 234;
Ballman v. Fagin, 200 U. S. 186; 50 L. Ed. 433;
Hale v. Henkel, 201 U. S. 43; 50 L. Ed. 652;
Heike v. U. S., 217 U. S. 423; 54 L. Ed. 821;
Smith v. U. S., 337 U. S. 137; 93 L. Ed. 1264.
Ex parte Cohen, 104 Cal. 524;
Ex parte Clark, 103 Cal. 352;
Rittenhouse v. Superior Court, 20 Cal. (2) 71;
McLain v. Superior Court, 99 Cal. App. (2) 274.

It was not only the application for the stamp tax which he made out and signed under statutory compulsion that constituted the compelled testimony.

It was also all of his statements made over the telephone and in his house that were recorded and introduced into evidence that constitute the testimony of gaming of which he was convicted.

Had the state placed Irvine on the stand to testify directly as to all the recorded conversations there could be no question about his statutory immunity.

Section 334, California Penal Code;
Ex parte Cohen, 104 Cal. 524;
Ex parte Clark, 103 Cal. 352;

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Peo. v. McCormick, 102 Cal. App. (2) 954, 228 P. (2) 349;
Rittenhouse v. Superior Court, 20 Cal. (2) 71;
McLain v. Superior Court, 99 Cal. App. (2) 274; 221 P. (2) 300.

The fact that his testimony was secured indirectly and involuntarily by surreptitious means and listening and recording devices does not remove the statutory immunity. The testimony was his own voice concerning the offense of gaming. Sec. 334 California Penal Code.

In *Zap v. U. S.*, 328 U. S. 624; 90 L. Ed. 1477 this court held that where officers seized a check and used it in evidence there was only a technical difference since they could have made a copy and used the copy. Here the officers through new and scientific devices copied and recorded Appellant's voice and used it in evidence. It was his testimony regarding the offense of gaming. Had he been called to the stand directly to testify immunity would have resulted.

Section 334, California Penal Code;
Ex parte Cohen, 104 Cal. 524;
Ex parte Clark, 103 Cal. 352.

The fact that it was obtained outside of court through devious and tricky methods does not remove the statutory immunity once it is used.

Smith v. U. S., 337 U. S. 137;
Rochin v. California, 342 U. S. 165; 96 L. Ed. 183;

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Watts v. Indiana, 338 U. S. 49; 93 L. Ed. 1801;
Wolf v. Colorado, 338 U. S. 25; 93 L. Ed. 1782;
Zap v. U. S., 328 U. S. 624; 90 L. Ed. 1477;
U. S. v. Monia, 317 U. S. 424.

In *Smith v. U. S.,* 337 U. S. 137, 146; 93 L. Ed. 1264, 1271 the court discusses statutory immunity at length.

And see also:

U. S. v. Monia, 317 U. S. 424;
Vajtauer v. Commissioner of Immigration, 273 U. S. 103, 113; 71 L. Ed. 560, 566;
Ex parte Cohen, 104 Cal. 524;
Ex parte Clark, 103 Cal. 352;
Peo. v. McCormick, 102 Cal. App. (2) Supp. 954; 228 Pac. (2) 349;
McLain v. Superior Court, 99 Cal. App. (2) 274; 221 (2) 323;
Rittenhouse v. Superior Court, 20 Cal. (2) 71.

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III.

THE SECRET MAKING OF A KEY TO APPELLANT'S HOME AND BURGLARIOUS ENTRY INTO THE HOME AND INSTALLATION OF SOUND AND RECORDING DEVICES AND THE TAKING OF TESTIMONY HEARD OVER SUCH APPARATUS, INCLUDING TELEPHONIC CONVERSATIONS, WITHOUT THE CONSENT OF THE RECEIVER OR THE SENDER CONSTITUTES THE OBTAINING OF EVIDENCE BY STANDARDS CONTRARY TO THE FUNDAMENTAL PRINCIPLES OF JUSTICE THAT INHERE IN OUR INSTITUTIONS. THE COURTS MUST PRESERVE THEIR OWN PURITY BY EXCLUDING SUCH EVIDENCE. THE USE OF SUCH EVIDENCE REQUIRES THE REVERSAL OF THE JUDGMENTS BELOW.

The agents of the state secretly made a key to appellant's houses; they burglariously entered the home to conduct an operation in violation of California law penalizing wire tapping. (Sec. 640 Penal Code of California.) The use of such evidence obtained by these methods is so shocking as to violate the fundamental principles of justice that inhere in our institutions.

Rochin v. California, 342 U. S. 165;
Betts v. Brady, 316 U. S. 455, 462, 473; 86 L. Ed. 1595, 1601, 1607;
Brown v. Walker, 161 U. S. 591; 40 L. Ed. 819;
Boyd v. U. S., 116 U. S. 616;

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Byars v. U. S., 273 U. S. 28;
McNabb v. U. S., 318 U. S. 332; 87 L. Ed. 819;
Feldman v. U. S., 322 U. S. 487;
On Lee v. U. S., 343 U. S. 747, 96 L. Ed. 1270.

This Court in discussing lawless enforcement of the law in effect in *United States v. Trupiano*, 334 U. S. 369 set out at page 705,

> "In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess an attachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusion upon the private lives of the individuals the framers of the Fourth Amendment required that hearers to judicial processes wherever possible and subsequent history has confirmed their wisdom of that requirement."

California's Article 1, Sec. 19 is virtually in the language of the Fourth Amendment.

No search warrant or other process was obtained to enter the private home of Mr. Irvine but a burglary was actually committed by the making of the key and the entering for the purpose of tapping wires—a felony. Burglary in California consists of any entry with intent to commit a felony. Section 459 California Penal Code.

In *Gouled v. The United States*, 255 U. S. 296, this court had occasion to specifically rule upon and pass

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upon the question of the admission of evidence obtained surreptitiously and by fraud on the part of a government witness and in that case it was distinctly held that such evidence was obtained by an unreasonable search and seizure in violation of the Fourth Amendment and the admission of the evidence was a violation of the Fifth Amendment.

In *Lisenba v. California,* 314 U. S. 166 this court held that violation of due process of law occurs if there is fraud used in the obtaining of evidence and that its use is inadmissible and in violation of the Fourteenth Amendment.

In the *Gouled* case this court said:

> "It would not be possible to add the emphasis which the framers of our Constitution and this court (in *Boyd v. United States,* 116 U. S. 616, in *Weeks v. U. S.,* 232, U. S. 383 and in *Silver Thorne Lumber Company v. United States,* 251 U. S. 385) had declared the importance to political liberty and to the welfare of our country of due observation of the right to guaranteed by the Constitution under these Amendments. The effect of the decision as cited are that such rights are declared to be indispensable to the full enjoyment of personal security, personal liberty and private property that they are to be regarded as the very essence of Constitutional liberty; and that the guarantee of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen, the right to trial by jury, to the

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writ of *Habeas Corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them by imperceptible practice of courts by well intentioned but mistakenly over zealous executive officers."

Again on page 305 the Court said:

"It is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force and/or coercion."

In *Goldman v. United States,* 316 U. S. 129, 134 this court indicated that if a dictaphone were placed in the office of one of the defendants by trespass and had worked and had been the means of gathering the evidence offered by the Government, this evidence would have been inadmissible. The Court points out that in its opinion through Chief Justice Taft on at least specific instances that there was no intrusion, invasion or trespass upon the physical premises of the defendant, and in the Solicitor's General Brief in the case of *Olmstead v. United States,* 277 U. S. 438, it was pointed out that if there had been an actual unlawful entry into the house the Fourth Amendment would have been violated.

While our contention is under the Fourteenth Amendment still where the provisions of California's

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Constitution are like those of the Constitution of the United States, then the two must be construed alike in their application to the State of California.

In *United States v. Jesse Jeffers, Jr.,* 342 U. S. 48, the prevailing opinion said in discussing the entry by officers to make the search for the sole purpose of seizing contraband . . . "the officers not only proceeded without a warrant or other legal authority but their intrusion was conducted surreptitiously and by means denounced as criminal."

In *Neuslein v. the District of Columbia,* 115 (2) 699, Chief Justice Vinson then a Circuit Judge writing the prevailing opinion of the Court of Appeals for the District of Columbia held that where police officers trespassed by entering the home of the defendant and while there upon the premises obtained certain evidence through their power of observation and hearing, they had conducted an illegal search and seizure. In *Silverthorn Lumber Company v. United States,* 251 U. S. 385 this court refused to allow Government agents to raid a defendant's office and study the papers obtained in the raid, copy them, then use the knowledge that it had gained to call upon the owners in a more regular form to produce them.

Justice Holmes rejected for once and all the argument that the protection of the Constitution covers the physical possession but not any of the advantages the government can obtain over the object of its pursuit by doing the forbidden act.

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In *Zap v. United States,* 328 U. S. 624 this court overruled by a 4 to 3 vote the objections to the unlawful search and seizure because the officers "were not trespassers. They did not obtain access by force, fraud, or trickery. The knowledge they obtained concerned the petitioners' conduct under contract for the government was lawfully obtained."

In the instant case the police ofifcers used force, fraud, and trickery. They forcefully entered the defendant's premises with the keys surreptitiously made. They fraudulently tapped his telephone wires and they used fraud and trickery to obtain powder upon his hand.

In *District of Columbia v. Little,* 178 (2d) 13, 18, the Appellate Court was affirmed, 339 U. S. 1. That court held that due process of law forbade inspection of a home.

And see Frank's dissenting opinion in *United States v. On Lee* in the second circuit 193 (2) 306, and see *People v. Dent,* 371 Illinois 33, 19 N. E. (2) 10, 20. See also *Bramstedt,* "Dictatorship and Police Power in 1945," page 144.

Surely there can be no double standard of morality in the matter of fundamental Constitutional rights. The same fundamental morals that govern the Fourth Amendment to the Constitution of the United States govern Article I, Section 19 of the Constitution of California in its application to the question of whether due process of law has been violated under the Fourteenth

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Amendment to the Constitution of the United States; furthermore Congress in passing Title 47, Section 605 has made its application to all states and all persons. (*Nardone v. U. S.*, 302 U. S. 308; U. S. 247 P. (2) 702.) Here the police officers obtained the information to divulge and publish its existence and contents for their benefit and for the benefit of the state in its prosecution. This is forbidden by Title 47, Section 605. The use of evidence obtained by methods used by the police in this case by the prosecutor illegally obtained and compelled evidence violated fair trial guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Even in criminal prosecutions in the United States of America, the Fourteenth Amendment guarantees fair trial—a sporting man's idea of fair conduct of the case.

This Court held that evidence obtained by force, fraud, or trickery is illegally obtained. This Court rejected its use as a violation of the Fourteenth Amendment to the Constitution of the United States.

Chambers v. Florida, 309 U. S. 227;
White v. Texas, 310 U. S. 530;
Ashcraft v. Tennessee, 327 U. S. 274, 90 L. Ed. 667;
Rochin v. California, 342 U. S. 165;
Olmstead v. United States, 277 U. S. 438;
Sorrells v. United States, 287 U. S. 435.

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In *Rochin v. California, supra,* the officers pumped the stomach of the accused. In this case they burglarized his house. They had a man make a key to the house surreptitiously while the owner was away. Then they entered the house for the purpose of violating Section 640 of the Penal Code of the State of California, to-wit, tapping phones and telegraph wires. They faked an arrest and then they spread powder upon the documents and books and papers of another man. Then they broke into the house without any warrant and compelled the appellant and defendant to exhibit his hands to them.

To permit the use of this kind of evidence is to condone burglary and other lawless tactics and "dirty business" on the part of the officers, see *On Lee v. U. S.,* 343 U. S. 747, 96 L. Ed. 1270 and *Schwartz v. Texas,* 21 L. W. 4055, and would give judicial sanction to receiving stolen property and making use of it when done by officers in the name of law enforcement.

In *Sorrells v. United States,* 287 U. S. 435, this court said: "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is a province of the court and the court alone to protect itself and the government from the prostitution of the criminal law."

And, in *Olmstead v. United States,* 277 U. S. 438, 484, Justice Brandeis said, "Our government is the potent, the omnipresent, teacher, for good or for ill, it teaches the whole people by its example." Are we

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then going to permit such lawless practices to receive the approval of the Supreme Court of the United States, or is this court going to hold that due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States forbids such practices as this?

Chambers v. Florida, 309 U. S. 227;
Rochin v. California, 342 U. S. 165;
Sorrells v. United States, 287 U. S. 435.

To paraphrase the language of this Court in *Rochin v. California, supra,*

> The "conduct (in this case burglary and other misconduct) . . . forbiddenly . . . "the judgment before us would be to afford burglary and other lawless conduct of the officers of the law the cloak of law. Nothing would be more calculated to discredit law and thereby to utilize the temper of a society." (342 U. S. 165.)

Such conduct on the part of the officers is "so offensive to human dignity in securing evidence from a suspect as is revealed by this record" as to be forbidden by the Fourteenth Amendment to the Constitution of the United States and its use ostracized.

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IV.

CONGRESS BANNED USE OF INTERCEPTED TELEPHONE COMMUNICATIONS. SCHWARTZ v. TEXAS SHOULD BE OVERRULED.

Congress has outlawed wire tapping and the use of information obtained over the telephone without the consent of sender or receiver Communications Act, Title 47, Sec. 605, U. S. Code; *Nardine v. U. S.,* 302 U. S. 379; 82 L. Ed. 314; *Nardone v. U. S.,* 308 U. S. 338, 84 L.Ed. 307; *Westin The Wire Tapping Problem,* 52 Col. L. Rev. 165; *Olmstead v. U. S.,* 277 U. S. 438; 72 L. Ed. 944; *Goldman v. U. S.,* 316 U. S. 129, 86 L. Ed. 1322. California has a state statute forbidding it and making its use a felony, Section 640 California Penal Code.

In the present case neither sender nor receiver authorized the use of the numerous conversations overheard and used in evidence. On the facts of this case *Schwartz v. Texas,* 73 Sup. Ct. (2d) 232, should be distinguished or overruled. Only Congress can remove the ban it has placed in use anywhere if intercepted telephone communications. Title 47, Section 605, U. S. Code. It is said that "bad cases" make "bad laws". The *Schwartz* case was such a "bad" case. This one is not—it is a "bookie case". The moral turpitude has been taken out of bookmaking by legislative permission to make bets at race tracks.

But Congress and California in making it a felony and in forbidding use of telephonic communications

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were not formulating a rule of evidence. It was forbidding all use of intercepted telephonic communications whether out of or in court. Forbidding its use as evidence was but a small part of the protection placed upon the instrumentalities of communication.

Section 605 Title 47 forbids *any person* who "having received such intercepted communication, or having become acquainted with the contents, substance, purpose, effect a meaning of the same or any parts thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto."

We can conceive of no clearer language or mandate. No Congressman needs to be psychoanlyzed to his intended meaning. Because the result may have been right in *Schwartz v. Texas,* is no sign the erroneous doctrine shoud be reaffirmed. Clearly Congress forbade the use of intercepted telephone conversations everywhere.

Congress did not lack language to exempt State courts from the general law. If such conversations can be used in a criminal case it can be used in a divorce case or in a stock exchange. The scope is limitless. But Congress has forbidden any use anywhere and only Congress should change it, not the courts.

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This court has not hesitated to do so on recommendation of its previous decisions.

California has also made wire tapping a felony (Sec. 640 California Penal Code.)

The liberty of the individual in the use of the telephone has been given Congressional protection. Be it the voice of the business man in a multi-million dollar deal, the conversations of justices of the Supreme Court in a confidential discussion of a case, the voice of the President and his attorney-general, or the placing of a bet over the telephone—each and all may not be divulged without the consent of the sender—so Congress has said. The fact that the place is a court room rather than the inside of a stock exchange or a race track does not alter the Congressional ban.

Schwartz v. Texas should be overruled.

V.

Setting up a fake road block, putting fluorescent powder on papers in the car illegally and falsely stopped, then entering appellant Irvine's home without a warrant, compelling him to submit to an examination under fluorescent light, and using this evidence against him shocks the conscience; offends a sense of justice and runs counter to the decencies of civilized conduct.

Rochin v. California, 343 U. S. 175.

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There was no legal warrant or other right for the police to set up a fake road block in order to rummage through papers to impregnate them with flourescent powder. The right to stop and search a car may be made only as an incident to a lawful arrest.

Marron v. U. S., 275 U. S. 192, 72 L. Ed. 230.

Rummaging through the car and the papers for the purpose of putting flourescent powder on them was another illegal act. Later the officers entered appellant's home without a warrant and forced him to submit to tests under a fluoroscope; then searched for and seized a wagering stamp and other evidence without appellant's consent.

We respectfully pray for reversal of the judgments below and an order of dismissal.

Respectfully submitted,

MORRIS LAVINE,

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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 12

PATRICK E. IRVINE, *Appellant*,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Appellee*.

CLOSING BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 12

PATRICK E. IRVINE, *Appellant*,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Appellee*.

CLOSING BRIEF

I

This Case Must Be Reversed Under the Doctrine of the Rochin Case, 342 U. S. 165 (No. 83, Oct. Term, 1951)

As Mr. Justice Reed pointed out in oral argument, reversal of this case is sought on the basis of conduct held in *Rochin* v. *California* to offend "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

Rochin v. *California*, 342 U. S. 165
Hebert v. *Louisiana*, 272 U. S. 312, 316
Grosjean v. *American Press Co.*, 297 U. S. 233
Lisenba v. *California*, 314 U. S. 166
Malenski v. *N.Y.*, 324 U. S. 401.

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Can this court say that the following conduct invading "the sanctity of a man's home and the privacies of life" (116 U. S. 630) is not contrary to the fundamental principles of *liberty*?

1. Secretly making by the police employed locksmith of a key to one's private home and bedroom. (Rep. Tr. 516-518)

2. Climbing by the police technician of the roof of one's home, drilling by him of a hole into it and clandestinely extending electronic wires through it into one's private quarters and bedroom to install hidden sound recording device, to listen in on one's most private and intimate life. (Rep. Tr. 31-34)

3. Stringing wires from the home to a garage three-quarters of a block away where the secret police attach a wire recorder and a loud speaker to listen and record around the clock. (Rep. Tr. 32-34, 42, 52)

4. For the secret police to listen in on telephone and personal conversations, on husband and wife activities and record them on a wire recorder and hear them through a loud speaker for a whole month. (Rep. Tr. 147-148, 35, 236-261)

5. For the secret police to conspire in violation of Section 182 of the California Penal Code to violate Section 653h in carrying on these activities without authority and approval of the Chief of Police or District Attorney, to install a dictaphone or use the same in this house. (Rep. Tr. 73-80; 516-518; 34)

6. For the secret police to conspire to and to commit burglary by entering the premises with a secretly made key to obtain information regarding telephone conversations in violation of Section 640 of the Penal Code of California. (Rep. Tr. 31-32; 516-518)

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7. To break into the home without a search warrant to arrest the defendant and seize books, papers, tax stamps. (Rep. Tr. 410)

8. To put fluorescent powder on books and papers and force the defendant to exhibit his hands under ultraviolet light in his home to incriminate himself. (Rep. Tr. 414-16; 524-525, 710)

"The word 'liberty' contained in that (Fourteenth) Amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of *all his faculties as well*"—*Grosjean* v. *American Press Co.*, 297 U. S. 244.

A right of privacy is a right derived from natural law guaranteed by the Constitution of the United States. (1939) *McDaniel* v. *Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 100, 2 S.E. (2) 810. *Melvin* v. *Reid*, 112 Cal. App. 285. *Kerby* v. *Hal Roach Studios*, 53 Cal. App. (2) 207. Louis Brandeis in 4 Harvard Law Review 193.

That right includes the right of privacy in one's home—in one's bedroom. Even *Wolf* v. *Colorado* says that an invasion of such privacy is forbidden under the Fourteenth Amendment and will be protected under it against arbitrary intrusion.

Wolf v. *Colorado* showed no such shocking misconduct as is betrayed by this record. In the *Colorado* case Dr. Wolf was arrested for assisting an abortion. The name of the woman aborted was contained in two day books on the doctor's desk, which became Exhibits "A" and "C" in the case. The arresting officer took the books without any search warrant allegedly in violation of Article 2, Section 7 of Colorado's Constitution. (See Record No. 17, January Term, 1948, pages 5, 11.) Motion to quash and for directed verdict were based upon violation of both the Colorado Constitution and the Fourth and Fifth Amendments to the U. S. Constitution (Page 17 of Record in *Wolf* case). It

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was contended that this search and seizure were incidents to the lawful arrest of Wolf.

This is a far different situation than the facts of our case, as set out above. In the *Wolf* case no home was burglarized, no key was made, no roof was drilled, no wires were strung, no private or intimate conversations between the doctor and his patients or his wife were listened in on and recorded for a month, by secret police unauthorized by the Chief of Police or District Attorney. The doctor was not forced to exhibit his hands under ultraviolet light to incriminate himself.

Our case, like Rochin, is obnoxious to those "fundamental principles of liberty and justice that lie at the base of all our civil and political institutions"—hence contrary to the 14th Amendment. It "shocks the conscience" and runs counter to "the decencies of civilized conduct."

Rochin v. *California*, 342 U. S. 165
Hebert v. *Louisiana*, 272 U. S. 312, 316.

Examination of the two State's brief—the one in this case and the other in the *Rochin* case bear striking parallels. The same untenable arguments are put forth in both. The fact that the argument failed to convince this court in the *Rochin* case against conduct shocking to a civilized and decent society has not lessened it in re-presenting the argument, and in similar form to justify the unconstitutional invasion of privacy exhibited by the record and numerous tape recordings in this case. The secret police of totalitarian countries could do no more.

Even in the *Wolf* case this court said:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty and as such enforcible against the States through the Due Process Clause." *Wolf* v. *Colorado*, 338 U. S. 25, 28.

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The arbitrary intrusion by the secret police in our case was forcefully brought out by Mr. Chief Justice Warren when he read Section 653h of the California Penal Code[1] making it a crime for a police officer to install a dictaphone *without* the consent of the chief of police or district attorney. On questioning by the chief justice, Mr. Clarence Linn, assistant attorney general of California, admitted that no such consent or permission was received. Hence these officers were engaged in a conspiracy (Sec. 182 Penal Code of California) to violate both Sections 640 and Sections 653h California Penal Code in the arbitrary intrusion of appellant's home.

If "the constable blundered" he did it secretly, wilfully and deliberately and stayed there a month to look and listen and record without authority of his chief superior, or the district attorney, and without due or any process,—contrary to liberty and justice that lie at the base of our institutions. (*Hebert* v. *Louisiana*, 272 U.S. 312, 316)

California, like the United States, and most states, has provisions for search warrants. (Chapter 3 California Penal Code; Sections 1323 et seq.) The right and reasonableness of the search is then determined by a magistrate, not the police, and if the magistrate determined that there was reasonable cause the search would be authorized, not "arbitrary intrusion" which the *Wolf* case says is forbidden under the 14th Amendment.

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[1] Dictograph. Installation of. Any person who, without consent of the owner, lessee or occupant, installs or attempts to install or use a dictograph in any house, room, apartment, tenement, office, shop, warehouse, store, mill, barn, stable or other building, tent, vessel, railroad car, vehicle, mine, or any underground portion thereof is guilty of a misdemeanor; provided that nothing herein shall prevent the use and installation of dictographs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney, when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals. (Sec. 653h, Calif. Penal Code.)

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Respondent says "On November 5, 1951 Irvine voluntarily caused to be filed in the office of the Collector of Internal Revenue at Los Angeles a "Special Tax Return and Application for Registry-Wagering." People's Exh. 63 (Resp. Br. 62-63)

> "By filing these returns Irvine and his employee Lippe served notice on the law enforcement agencies that they intended to engage in the commission of a felony in Los Angeles County, and in all likelihood at the premises at 3916 E. Second street, Long Beach."

If this is correct, the police were then in a position to obtain a search warrant as authorized and supervised by a magistrate in accordance with law. Search warrants are designed to protect the Constitutional requirement. *McDonald* v. *U. S.*, 335 U. S. 451; *Wolf* v. *Colorado*, 338 U. S. 25. And if Irvine was the bookmaker, Mr. Linn tried to paint him he had to have a "book" on his premises in which bets were being recorded daily—it did not take a whole month of intimate listings. Our constitution condemns a "too permeating police surveillance • • • (as) a greater danger to a free people than the escape of some criminals from justice, *U. S.* v. *Di Re*, 332 U. S., 581, 582.

"Bookmaking" says the District Court of Appeal of the State of California, "is the making of a book of bets." *People* v. *Coppla*, 100 Cal. App. (2) 766, 768; *People* v. *Sumner*, 117 Cal. App. (2) 40. If Irvine was bookmaking as charged in Count II of the information, or keeping and occupying a premise for the purpose of recording and registering bets, as charged in Count III, or making or forwarding them, as charged in Counts IV and V his arrest was possible on any day, since he had to have the "book", the paper, or papers, and the paraphernalia usually ascribed to bookmakers—pencil, pad with numbers indicating races and bets made thereon and recording of bets. See *People* v. *Kelley*, 22 Cal. (2) 169; *People* v. *Onofrio*, 65 Cal. App. (2) 585—both bookmaking cases.

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We cannot complain of the acts of spying, invasion of privacy, and ordered liberty in totalitarian countries, if we set this case up as an example of "ordered liberty" and allow the procedure used here to receive the approval of this court as our basic concept of ordered liberty.

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that * * * evidence so acquired * * * shall not be used at all." Otherwise the prohibition is a mere "form of words." *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385, 392; *Watts* v. *Indiana*, 338 U. S. 49, 55.

On this ground alone the judgments should be reversed. We treat, nevertheless, of other matters in the briefs and oral arguments.

II

The Wagering Stamp Tax Act and Reports Secured Pursuant Thereto Are Unconstitutionally Construed and Applied in This Case

This court considered the constitutionality of the Gambler's Occupational Tax Act, Title 26 Sec. 3285-3298 U.S. Code, and upheld its constitutionality on its face in *U. S.* v. *Kahriger*, 73 Sup. Ct. 510; (No. 167; Oct. 1952). No tax had been paid in that case and no report made pursuant thereto. The court, without having a person before it who had made application for the stamp and who had not reported, gave a speculative opinion on what the law might be. The language of that case therefore is pure dicta.[2] We therefore ask the court to re-examine the law, as now construed and applied in this case, with facts actually before it—including reports to the Internal Revenue bureau required to be made pursuant to this statute which were not before the court when it was passing in the *Kahriger* case,

[2] See definition of "Dictum" under "Courts", Corpus Juris Section 320.

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and ruling merely on the constitutionality of the statute under an indictment dismissed on motion.

1. The tax is not a tax on *gambling*—licensed gambling is permitted (97 Cong. Record 12239).

2. Draw poker, stud poker, blackjack, roulette, dice, craps, bingo, and keeno, are exempted.

3. Pari-mutuel betting at race tracks is exempted.

The statute was therefore arbitrarily aimed at the *bookmaker,* not operating at any track, since the moral turpitude has been taken out of betting in California, at least, by the licensing of betting and gambling at race tracks.

The statute as construed and applied in this case, compelled the appellant to apply for a wagering stamp, and to confess that he is engaged in the business of wagering not at a track or licensed place and further to make reports showing the wagers he made contrary to state law and to pay a tax on it, and to make this report available to the prosecutor for prosecution of the state crime.[3] The federal statute has therefore coerced a confession of crime contrary to the Fifth Amendment to the United States Constitution. In *Boyd* v. *U. S.,* 116 U. S. 616, the court said:

> " * * * any compulsory discovery by extorting the party's oath * * * is contrary to the principles of a free government. It is abhorrent * * * to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

In this day and age when we are trying to exemplify standards of liberty and freedom for which three wars have been fought we cannot uphold the compulsory use of force

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[3] As admirably pointed out in appellee's brief, footnote 1, page 34, the mere possession of the stamp would be regarded in many states as prima facie evidence of guilt. No case raised the question of the constitutionality of using this evidence.

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to extort confessions whether by the fist or the club of wood or the club of a statute. If it is right for us to say by statute "You confess or you go to federal prison; having confessed you now go to state's prison" then what is wrong with Malenkov, Tito, Peron and others doing the same? The example we set in this case may well have world-wide reverberations regarding our construction of our concept of "ordered liberty."

In *Brown* v. *Walker*, 161 U. S. 591, it was said that there is very little likelihood that a man might be prosecuted by the state although offered immunity under federal statutes and that it was so improbable that no man would suffer it to influence his conduct.

But it has happened here. And the government has compelled by statute a confession of conduct against a particular species of a particular type of occupation at a particular location, which, when carried on at that location, is forbidden by law. Wagering at Santa Anita race track by the same person would be lawful; wagering at 3916 E. 2nd Street, Long Beach, was and is unlawful.

The object then, of the statute, is not to suppress gambling or gamblers—but to secure confessions of crime of a particular species of gambling at unauthorized locations unlicensed by the states, and to enable state prosecutors to use these confessions in state prosecutions, as was done in this case.

The Fifth Amendment forbids federal compulsion to extort confessions of crime. So does the Fourteenth.

Chambers v. *Florida*, 309 U. S. 227
Ashcraft v. *Tennessee*, 322 U. S. 143
Lisenba v. *California*, 314 U. S. 229
Malinski v. *N. Y.*, 324 U. S. 401
White v. *Texas*, 310 U. S. 530
Brown v. *Mississippi*, 297 U. S. 278
Gallegos v. *Nebraska*, 342 U. S. 355

A compelled confession of crime would be inadmissible in the federal court under the Fifth Amendment, and would

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be objectionable on that ground. If obtained prior to arraignment, it would be objectionable on still further grounds.

U. S. v. *Carignan*, 342 U. S. 36
McNabb v. *U. S.*, 318 U. S. 332
Fed. Rules Cr. Pr. 26, 18 U.S.C.A., Rule 5a.

It is also inadmissible under the Fourteenth Amendment under the cases cited above.

Federally compelled testimony was never intended to be used in the State Courts.

Brown v. *Walker*, 161 U. S. 591.
Lustig v. *U. S.*, 338 U. S. 74
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Ballman v. *Fagin*, 200 U. S. 186
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This is not the first time an attempt has been made to control people's conduct by stamp tax.

This court had to strike down a stamp tax in *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245-250. That case was an attempt to muzzle newspapers by putting a special tax on their advertising. It was an attempt to revive an 18th Century tax device. (See May's Constitutional History of England; also opinion in the *Grosjean* case.) There the tax was used to muzzle expression of views; here it is being used to compel expression of crime. The misuse of the tax weapon is the same.

In the *Grosjean* case this court characterized the tax weapon as "a deliberate and calculated device in the guise of a tax" to limit the circulation of information and struck it down. In this case the tax is a "deliberate and calculated device" to compel a confession and this court should strike it down. The misuse of the power is the same in either case. The constitution forbids it.

In view of the above we ask this court to reconsider its decision and dicta in the *Kahriger* case, and in the light of the facts of this case to hold that the Stamp tax Act in-

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herently and as construed and applied herein is unconstitutional.

A tax whose chief objective is to control morals, politics, thought or deed should not be allowed to stand in a democracy. Today, our government is the potent teacher of the other countries of the world. By its example and leadership, the world will follow.

To paraphrase the language in the *Grosjean* v. *American Press Co.* case:

> "The tax here involved is bad, not because it takes money from the pockets of the appellees. . . . It is bad because, in the light of its history and of its present setting it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information" etc. (297 U. S. 45-250)

III

The Gambler's Occupation Stamp Tax Is Contrary to the Fifth, Tenth and Fourteenth Amendments to the Constitution.

In our petition for certiorari we took the position that the stamp tax was constitutional on its face as a taxing measure. We also took the position that Congress having the power to tax, could not have that tax interfered with. That was prior to this court's decision in the case of *U. S.* v. *Kahriger,* 167 October Term, 1952; 73 Supreme Ct. 510. Inadvertently that argument was carried into our opening brief. We were mistaken and withdraw it.

The act shows on its face and in its congressional history that it was not intended as a true tax matter, but as a police measure. The act itself provides that it does not exempt any person from any penalty for engaging in violation of state law. It also provides for certified copies of the stamp tax record for state prosecutors. Such business is reserved to the states. Tenth Amendment U. S. Constitution.

U. S. v. *Constantine,* 296 U. S. 287
U. S. v. *Butler,* 297 U. S. 1.

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As construed and applied in this case, the act compelled incriminatory disclosures to federal authorities used by the state authorities to convict of a state crime. He was compelled in the present case to confess to past acts, a situation not contemplated in the *Kahriger* case.

IV

Use of the telephone conversations is forbidden. We have fully covered this point in our opening brief. Appellee makes the point that in earlier cases in this court the disclosures must result from an actual physical connection to telephones. Since the *Goldman* case, 316 U.S. 129, many advances have been made in electronics. Induction coils can now garner voices from afar. Television and radio can be turned on across the room without wire connections. Electronic connection is equal to physical connection.

In any event California law fobids use of such information (Sec. 640 Penal Code) and even if merely secured over the dictaphone—California forbids its use unless authorized by the Chief of Police or District Attorney Sec. 653h, California Penal code.

The police, in the "cool, calm" of a garage, listened in on the private life of appellant from his private bedroom on recorder and loud speaker for a month. What was "whispered in the closet" was "proclaimed from the housetop." (See Louis Brandeis on the Right of Privacy, 4 Harvard Law Review 196)

Such shocking conduct is not "ordered liberty" under the constitution.

We pray for reversal of the judgments.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1953
No. 12

PATRICK E. IRVINE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1953
No. 12

PATRICK E. IRVINE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF.

Opinions Below.

The opinion of the California District Court of Appeal, Second Appellate District, Division II, filed October 2, 1952, is reported in 113 Cal. App. 2d 460. By Minute order filed on October 15, 1952, and reported in 113 A. C. A. No. 7(3), the same court denied a Petition for Rehearing. By Minute Order filed on October 30, 1952, and reported in 39 A. C. No. 26(2), the California Supreme Court denied a Petition for Hearing, with two justices voting for the granting of the petition.

Jurisdiction.

The order of the California Supreme Court denying the Appellant's Petition for Hearing was filed October 30, 1952. Petition for Writ of Certiorari thereafter was filed in the Supreme Court of the United States, and the

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Petition for Writ of Certiorari was granted on March 9, 1953. The Petition for Writ of Certiorari, on page 2 thereof, asserted that jurisdiction of this court arises out of Title 28, Sections 2101-4, United States Code, and Rule 38½, Rules of the Supreme Court of the United States.

Statutes Involved.

The pertinent constitutional and statutory provisions appear in the Appendix, *infra,* pages 1 to 14.

Statement of the Facts.[1]

At 11:30 a.m. on November 15, 1951, Police Officer Calori saw an automobile which he subsequently learned was registered to Lippe, parked at the corner of Chestnut and Florista Streets in Los Alamitos. [Rep. Tr. pp. 73-74.] Across the street from where the car was parked, there was a white house with a real estate sign in front. [Rep. Tr. p. 74.] He watched the car and house from 11:30 a.m. until 5:30 p.m., at which time a man emerged from the white house, got into the car, and drove to Seventh and Ximeno Streets, where he proceeded west on Ximeno. [Rep. Tr. pp. 80, 81.]

On November 28, 1951, Lippe drove his Chevrolet car to 3916 East Second Street, where the petitioner lived, and parked. [Rep. Tr. pp. 82-85.] He entered the house at about 5:15 p.m. and remained there until 5:23 p.m. [Rep. Tr. p. 85.]

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[1]References to the Clerk's Transcript of the proceedings of petitioner's trial are designated as "Clk. Tr." References to the stenographic transcript of the proceedings of the trial are designated as "Rep. Tr."

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On November 29, 1951, Lippe parked his car in the vicinity of 3916 East Second Street about 5:15 p.m., entered the house at that address, and remained there until 5:30 p.m. [Rep. Tr. pp. 146, 147.]

The Key.

About December 1, 1951, Police Officer Jacobsen instructed a key maker to make a key to the petitioner's home. He received the key the next day. [Rep. Tr. pp. 516-518.]

Installation of the Microphone.

On December 1, 1951, Mr. Mason, a recording engineer, went to the premises at 3916 East Second Street, Long Beach, with police officers from the Long Beach Police Department, and strung a wire up the alley next to the premises, to a garage about three-fourths of a block away. [Rep. Tr. pp. 31, 32.] On December 3, 1951, Mr. Mason carried the wire which he had previously strung up in the alley onto the roof of the premises at 3916 East Second Street, bored a hole in the roof, stuck his wire through the roof, went downstairs and entered the house, where he crawled through a hole in the top of the closet and installed a microphone above the light fixture box in the hall. [Rep. Tr. pp. 32, 33.] He then went back to the garage, where he connected the other end of the wire to a preamplifier, and thence to a recording machine and loudspeaker which he had placed there, thereby establishing a listening post in the garage. [Rep. Tr. pp. 32-34, 42, 52.] He and his wife instructed the police officers in the operation of the equipment. [Rep. Tr. p. 34.]

There was nothing connected to the telephone instrument or lines. The equipment which was installed was

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not capable of transmitting what was said by someone telephoning into the house, unless they spoke so loudly that it could be heard in the house itself as it came out of the receiver. It was capable of transmitting what was said by anyone talking over the telephone from the house. [Rep. Tr. pp. 50, 51.]

What the Police Heard Over the Microphone and What They Saw Near the Petitioner's Home.

On December 3, 1951, Lippe parked near the house at 3916 East Second Street at 5 p.m., and left the house there at 5:20 p.m. [Rep. Tr. pp. 147, 148.]

On December 8, 1951, at about 11:58 a.m. Officer Hermansen, who was at the listening post in the garage, heard over the loudspeaker a telephone being dialed. Then the petitioner said, "Can I speak to Jamoke?" "In the first place you've got the horse down wrong." "In the 8th, 2 to win." "King's Boy, 2 to win. In the fourth, Handy Display. In the fifth, Limbo Junior, 2 to win. I've got some more for you. In the third, Clam Digger." "Fair Grounds." [Rep. Tr. pp. 234, 235.] On the same day the officers complained that there was a humming coming to them through the microphone, so Mr. Mason entered the premises at 3916 East Second Street again and moved the microphone into the bedroom. [Rep. Tr. p. 35.]

On December 11, 1951, Officer Hermansen heard over the loudspeaker somewhat after 11 o'clock in the morning the sound of a telephone being dialed, and the petitioner saying, "How you doing, Tony?" There was a pause and then the petitioner said, "Here's a parlay, 1-7, 2 across." "47-58-68-73-84-57-65-88." Then, "16-51, 1-across parlay." "17-413." And "There's a criss-cross, Fair Grounds in the third, Blue something. In the fifth,

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Blue Missus. Tropical in the first, Blue Noma, 2 to place, criss cross." [Rep. Tr. pp. 236, 237.]

On the same day, December 11, 1951, Lippe emerged from the house at Chestnut and Florista at 4:50 p.m., entered his car, and drove to 3916 East Second Street, where he entered the house there at 5:05 p.m. [Rep. Tr. pp. 85-87.] About 5:09 Officer Hermansen recognized the voice of Lippe coming over the loudspeaker at the listening post, and heard him say that there was a man outside by a box fooling around with some wires and a box; that some woman had gone out to empty some trash and had told him about it; that he had gone out right away but the man was gone. [Rep. Tr. p. 237.] He talked more about the man, and then said, "I tried to get hold of several guys and some horse had been bet and he wanted to lay off some money on the horse and he couldn't get hold of anyone to lay it off and he didn't know what to do." The petitioner said that he was going to get some new scratch sheets out of 'Frisco which had numbers on them so they could work with numbers. Lippe said, "Like the Digest?" The petitioner and Lippe talked about scratches. [Rep. Tr. pp. 238, 239.] They talked about a bet which Lippe said some man had made. While they were talking there was a sound of the telephone being dialed, and the petitioner said, "Hello, is Pete there?" [Rep. Tr. p. 239.] The petitioner then said that 2 and 2 across was right, and two across was wrong, but that when Pete had laid 4 and 4 off he laid it off right. A short time later the telephone rang and the petitioner said, "In the 6th, John Harold." Lippe said, "In the second, Skeeter," and the petitioner repeated it. Then other horses' names and different odds were mentioned. [Rep. Tr. p. 240.]

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On December 12, 1951, Officer Hermansen heard over the loudspeaker shortly before noon, a telephone being dialed. The petitioner was heard to say, "Tropical, 46, 1 and 1. Fair Grounds 22, 2 across." "If Jim calls tell him to get down here and get straightened up. I'm not going to keep books with him." [Rep. Tr. pp. 240, 241.]

On the same afternoon, Lippe's car was at Chestnut and Florista in Los Alamitos at 4:50 p.m., and at 3916 East Second Street at 5:05 p.m. [Rep. Tr. p. 149.] At 5:09 p.m., Officer Hermansen, who was listening to the loudspeaker, heard Lippe saying "2 criss crosses on the first race," and different races and horses mentioned. At 5:26 he heard the sound of a telephone ringing, and the petitioner saying, "In the fourth, Bar Annie; in the 6th, Chorus Girl. Paid $13.60, $6.90, $4.80. Yeah. And the 7th ran out." [Rep. Tr. pp. 242, 243.]

On December 13, 1951, at 11:35 a.m. Officer Hermansen heard the petitioner on the loudspeaker saying, "That's 2 across. Here's some for McComb. Tropical in the 4th, Man of the Hour. Here's some for Mace, 2 across, Bay Meadows, 16, 514, 67, 73, 84, 87. Bay Meadows, 84, 1 and 1. Tropical 45, 1 and 1, and 1 and 1 parlay. Tropical, 17, 1 and 1. Fairgrounds 67, 1 and 1. Bay Meadows, 69, 1 and 1. Tropical, 410, 1 and 1, and 1 and parlay." "Bay Meadows, 2 to place, criss cross." [Rep. Tr. pp. 243, 244.] At 5:15 p.m. on the same day, Lippe emerged from the white house at Chestnut and Florista, got in his car and drove to 3916 East Second Street, arriving there at 5:30 p.m. He entered the house. [Rep. Tr. pp. 87, 88.] At 5:32 Officer Hermansen who was listening to the loudspeaker, heard Lippe say, "You took away everything he booked and we had some good action." "Paid him $151.00. It shows on my scratch sheet." The peti-

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tioner said, "Without scratching, how do you get five-sixty?" Then other numbers and quarter horse races were mentioned. The petitioner said, "Tim made that $30.00 bet." [Rep. Tr. pp. 244, 245.] Lippe left the petitioner's house at 5:45 p.m. [Rep. Tr. p. 88.]

On December 14, 1951, Lippe's car was parked near Chestnut and Florista at 5 p.m. He was seen in the car in the vicinity of the petitioner's home at 5:45 p.m. He went into the house. [Rep. Tr. p. 150.]

On December 15, 1951, Lippe left the house at Chestnut and Florista at 5:25 p.m. and drove to 3916 East Second Street, where he entered the house there. [Rep. Tr. p. 88.] At 5:45 p.m. Officer Hermansen, who was listening at the loudspeaker, heard the petitioner talking about someone hitting a parlay and waving a scratch sheet in his face. He said, "It's bad enough for the son-of-a-bitch to hit you with a limit horse without waving a sheet in your face." "Two horses paid the limit." "Get a late paper tonight and lock it up. I'm going to be gone and won't be back until 7 or 8 tomorrow night." Lippe said, "I'll get an Examiner." The petitioner said, "Good night, Jamoke." [Rep. Tr. pp. 246, 247.]

At 11:23 a.m. on December 17, 1951, the sound of a telephone being dialed came to Officer Hermansen over the loudspeaker. The petitioner said, "How you doing, Jamoke?" "Just give him whatever he wants to hold on his sheets. There's no giving him an individual layoff. If he don't want it, then to hell with him. You're rid of it as far as my book is concerned." [Rep. Tr. pp. 247-249.]

At 2:55 p.m. on the same afternoon, December 17, 1951, Lippe's automobile was parked at 3916 East Second Street. [Rep. Tr. pp. 89, 100.] At 2:55 p.m. Officer

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Hermansen, who was listening at the loudspeaker, heard Lippe say, "I gave him six across." The petitioner said, "Would you give him more than six?" Lippe said, "No." Then the petitioner said, "When you lay it off my books it is through with my books as far as that is concerned." Lippe said, "Well, you really wanted me to lay 12 and 12 across of didn't you?" The petitioner said, "You are not going to give him 12 off across off my sheet just to satisfy him." Lippe said, "Bob only wanted 15 across, and Bruce had enough on that horse so he called Pete and asked him how much he wanted off." The petitioner said, "Pete's book and my book are two separate books." Lippe said, "Then Pete only got half of the $16." The petitioner said, "That's right. Pete had $16 showing but I gave him only $8 which is his share." "Pete's book is separate from my books just the same as Joe Irvine's book is separate from my book." "Listen, Jamoke, let me tell you again. When you lay off my book it is through with my book as far as that is concerned. My book is separate from Pete Curti's book." "In fact, don't give him any more." "This is a separate book altogether." "I am not broke yet." "I am thinking of financing another book." [Rep. Tr. pp. 250, 251.] The same persons talked more about lay-offs. [Rep. Tr. pp. 159, 163-167.] At 3:15 p.m. Lippe's car left 3916 East Second Street. [Rep. Tr. pp. 89, 100.]

On December 18, 1951, at about 3:05 p.m. Lippe entered his car at Chestnut and Florista and drove to 3916 East Second Street, arriving there about 3:20 p.m. [Rep. Tr. pp. 89-91, 150.]

On December 24, 1951, Curti's automobile was parked at the intersection of Chestnut and Florista in Los Ala-

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mitos. Later it was parked at 3916 East Second Street. [Rep. Tr. p. 151.]

On December 26, 1951, at about 11:42 a.m., Officer Hermansen heard a voice coming over the loud speaker at the listening post. The petitioner said, "How are you doing, Pete? Tropical in the eighth. Rough Cookie." He mentioned Tropical in the ninth, and said, "Here's some more for Mace. Tropical, 5.13, one and one, 66, one and one, 86, one and one, 91, one and one, one and one, round robin. Fair Grounds. 31, one and one, 51, one and one, and one and one round robin. On the fourth. Okay, Pete." [Rep. Tr. pp. 251, 252.]

On December 27, 1951, at 11:25 a.m., Officer Hermansen heard the petitioner's voice over the loudspeaker at the listening post saying, "Pete." Then "T-43, five to win, five to place. Keen, 15 to win, Burr five to win. 59, 15.22, 35, 52." [Rep. Tr. pp. 252, 253.] At 3 p.m. on that day, Curti's car was parked in front of the white house at Chestnut and Florista. [Rep. Tr. pp. 92, 93.] Later Curti drove to 3916 East Second Street where he entered the house there at about 3:30 p.m. [Rep. Tr. pp. 93, 94.] At about 3:25 p.m. Officer Hermansen, from the loudspeaker at the listening post, heard the petitioner and Curti talking. The petitioner said, "Is this all of them?" Curti said, "We do pretty good in the mornings." "It will be all right as soon as they take the new machine over, won't it, Pat?" The petitioner said, "They paid the tax today and $52 in the layoff plus tax." Curti said, "That other woman had the same deal going on. I gave Joe a little." [Rep. Tr. pp. 254, 255.] Curti left at 3:48 p.m. [Rep. Tr. p. 94.]

On December 28, at about 12:01 p.m., Officer Hermansen heard through the loudspeaker a telephone being dialed,

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and the petitioner saying, "How're you doing, Pete? Tropical, 37, 64, 9.11, 96, one and one criss-cross. Whitman, one to place, criss-cross." "You made a mistake on Nelson. You paid him 7.20 for the $5 he bet and that 7.20 was payment for only $2." [Rep. Tr. pp. 255, 256.]

At 2:53 p.m. on the same date, Officer Hermansen heard a telephone ring over the loudspeaker, and the petitioner say, "I can't quit. No, I can't quit." "I still have the same people playing." "Some of them don't play as much." He mentioned the name "Doc" and said, "I will call out and tell them that you are okay. When you call out call 908976 or 81403 if the first one is busy." [Rep. Tr. p. 257.] Immediately after these statements of the petitioner, there was the sound over the loudspeaker of a telephone being hung up and then being dialed. Then the petitioner said, "A Doc Cosgrove might call you. He is okay in case he calls. He usually bets in the 20's." [Rep. Tr. pp. 257, 258.] At 5:12 p.m. Curti got into his car on Chestnut and Florista and drove to 3916 East Second Street, where he entered the house at 5:20 p.m. and left at 5:40 p.m. [Rep. Tr. p. 105.]

Again on December 28, 1951, Mr. Mason entered the premises at 3916 East Second Street and moved the microphone to a place behind the wall of the closet, boring a hole in the wall in order to do so. [Rep. Tr. p. 36.]

On December 29, 1951, Curti, accompanied by a woman, drove from Florista and Chestnut Streets to 3916 East Second Street. They entered the house at that address and remained inside about 20 minutes. [Rep. Tr. pp. 151, 152.]

On December 31, 1951, at noon, officers who were on duty at the listening post heard, over the loudspeaker, a telephone being dialed and the petitioner saying, "Hi,

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you, Ruth. I just called to see how you figured you had anything coming on that one dollar to win bet." "In the third race he ran out. He was with Tapebuster. So Tapebuster was out." "He got two horses in the fourth race mixed up. He probably made a mistake writing it down." "Told him not to write it down, but he keeps on doing that." "Got a new man out there, but he won't be with me very long. I am going to replace him. It will take about a week to get a new man broken in." "Contact." "So he made a mistake. I intend to pay you for the parlay. Pete wound up wrong in writing it out. A difference of $9.30." [Rep. Tr. pp. 258, 259.] About 12:18 on the same day the sound of the telephone being dialed again came over the loudspeaker, and the petitioner was heard to say, "How're you doing, Pete? Here's one for McCombs." "Here's some for Mason. In the Tropical, Woodman, Fairgrounds. 3.11, one and one, 37, one and one; and on Ruth, give her $9.30 more. Okay, Pete." [Rep. Tr. pp. 259, 260.]

At 5:26 p.m. on the same date, December 31, Curti's voice was heard over the loudspeaker. He said, "That lady made two more bets today." "Another woman made a $2 bet. Today that lady bet her $4 back. She won 80¢. I will have to give you $3.20. She won't pay no tax." "The place is hard to find without the Christmas tree lit up." "Give me my figures what I owe you in the morning, that is with everything." "You know that groceryman named Bailey; he won't be home tomorrow." "This guy starts betting again." "I gave this lady her $9 credit." "That son of a bitch wins every day." "Three $50 tickets." [Rep. Tr. pp. 260, 261.]

On January 2, 1952, Curti drove his car from the front of the white house at Chestnut and Florista at 5:22 p.m.

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[Rep. Tr. p. 107.] At 5:35 p.m. Officer Hermansen, who was listening at the loudspeaker in the listening post, heard Curti say, "Yeah, he beat you pretty good. We got a bum break in the last race. Lots of action." He mentioned the word "scratch." Then he said, "He threw it in the wastepaper basket. Yes, I know who he is." He mentioned horses and layoffs. Then he said, "No, that is your ticket." The petitioner said, "It wouldn't be Ruth?" Curti said, "No." "It ain't mine." The petitioner said, "I will make you pay tax if you don't cross it off." "$24. Take $8 off of this. When you get a scratch mark it clear off. You had 3.90, 11.40 and 12.10." The sound of an adding machine came over the loudspeaker, and Curti said, "Yes. I just put it down that way." "Just put it down that way. That guy said he would see you in the morning, that service guy." "I got a copy of all the tickets, and eight from 24 is 16. There is the difference." The petitioner said, "Make it lose 11.40 instead of 9.40." [Rep. Tr. pp. 261, 262.] "Lose a dollar apiece," said Curti, "I still don't see how you do it, Pat." The petitioner said, "Here's your tax over here." Curti said, "Yes, I see how you do it now. Yeah. That is how some of the guys want their damned tickets." The petitioner said, "That wouldn't be Rucker?" Curti said, "I will find out for you. I will go right on by." The petitioner said, "Wouldn't be Cosgrove, Norm, 705, Naomi, P. C., Holt, Gilly." Curti said, "No, it wouldn't be Gilliam. He is dead." Curti then said, "I will find out in about 15 minutes. Mason got two tickets." The petitioner said, "It wouldn't be Margo, Bertha." Curti said, "It is a man. I know P.C. got a ticket. Calls in early in the morning." A clock chimed six times. Several minutes later the sound of a telephone being dialed came over the loudspeaker, and Curti said, "I will be

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there in about 15 minutes. I am at Pat's and I will have to go by the club." [Rep. Tr. pp. 262, 263.] Curti's car left the petitioner's home at 6:05 p.m. [Rep. Tr. p. 107.]

On January 3, 1952, Curti's car left Chestnut and Florista at 3:40 p.m., and was parked near the petitioner's house at 3:55 p.m. It remained there until 4:28 p.m. [Rep. Tr. p. 108.]

On January 4, 1952, Curti and a woman were seen in his Ford in the vicinity of Chestnut and Florista at 5:20 p.m. They went to the petitioner's home, where they parked and went upstairs. The left at 6 p.m. [Rep. Tr. pp. 108, 109.]

At 11:54 a.m. on January 5, 1952, officers on duty at the listening post, heard the sound of a telephone being dialed coming over the loudspeaker. Then the petitioner said, "How're you doing, Pete? Yeah. That is all we can do. Here's a parlay for McCombs in the third. Dr. Ifroo, Tropical." "Number 7 to the seventh. Little Falls. Four across parlay. Santa Anita in the second, Tingaling. One to place and one to show. That is all of them." [Rep. Tr. p. 265.]

How the Police Put Fluorescent Powder on the Betting Markers.

Officer Gautt and other officers agreed upon a plan of operation in connection with stopping Curti's car. [Rep. Tr. p. 153.] Commencing at 5:35 p.m. on January 5, 1952, Officer Gautt followed Curti, who was in his Ford, from Chestnut and Florista in Los Alamitos. [Rep. Tr. p. 153.] At 7th and Pacific Coast Highway he passed Curti and drove directly in front of him to 7th and Park Avenue, where officers were waiting for his signal that he and Curti had arrived. When he gave the signal, two

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motorcycle officers and a patrol car with Officers Jacobsen and Dulaney in it, followed the two cars to Ximeno and Fourth, where they stopped them. One of the motorcycle officers approached Gautt's car, and Gautt got out with his hands up. The other officer pulled up alongside of Curti's car, and the patrol car drew up in back of it. [Rep. Tr. pp. 154, 155, 338, 339, 401-403.] Gautt was searched for weapons, and one was found in his belt. [Rep. Tr. p. 156.] The officer took Gautt back to the patrol car, where he remained. [Rep. Tr. p. 156.]

While Gautt was being searched by the motorcycle officers, Officer Dulaney asked Curti to get out of his car. He did so, and his passenger, Audie Greer, did so too. She was carrying a coat on her arm, and there were a number of pieces of paper under it. [Rep. Tr. pp. 340, 403.] Officer Jacobsen asked her to put the articles on the front seat of the car, and she did so. [Rep. Tr. pp. 404, 406.] Officer Dulaney searched Curti, and took some pieces of paper, on which there were numbered lines and pencilled writings, from his shirt pocket. [Rep. Tr. p. 341.] Dulaney put these papers on the front seat of Curti's car. [Rep. Tr. p. 343.] Officer Jacobsen then leaned into Curti's car and went through the papers which had been put on the front seat, attempting to touch each of them and impregnate it with white crystalline powder, which was fluorescent under ultra-violet rays, which he had on his hands. [Rep. Tr. pp. 339, 340, 344, 345, 402, 407, 408, 416-419.]

The officers searched the rest of Curti's car. [Rep. Tr. p. 409.] They told him that they were stopping all late model Fords of a fairly dark color, as they were looking for a liquor store robber. [Rep. Tr. pp. 346, 347.] The officers gave Curti permission to leave, so he and Audie Greer got into his car and drove away. [Rep. Tr. p. 409.]

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That same evening, over the loudspeaker, Curti was heard telling about having been stopped by the police, and about the other person in a similar car who had also been stopped. Curti said that some fellow had won on four jockeys. [Rep. Tr. p. 229.] The petitioner said he had won 8.80, but it cost him $3. Curti said that he owed him on that sheet, and they talked about sheets and horses. Curti talked some more about having been stopped by the police. [Rep. Tr. p. 230.] The sound of an adding machine was heard. [Rep. Tr. p. 231.] Curti and Audie Greer left the petitioner's house and drove away about 7 p.m. [Rep. Tr. p. 410.]

The Arrest—What the Officers Found.

Officers Jacobsen and Kennedy then entered the petitioner's home, put him under arrest, and searched the premises. [Rep. Tr. p. 410.] In a drawer in a desk in his bedroom they found 46 pieces of paper of the same size, shape and texture as those which had been on the front seat of Curti's car that evening. [People's Ex. 20; Rep. Tr. pp. 411, 682.] Before Officer Jacobsen touched the papers, Inspector Kennedy picked them up and they were put under an ultra-violet light. Under that light they showed a greenish purple color, just as did the powder which Officer Jacobsen had put on his hands prior to handling the papers in Curti's car. [Rep. Tr. pp. 411-416, 683, 684.] In the opinion of Officer Jacobsen, who was familiar with the paraphernalia, signs, symbols and characters commonly used by bookmakers in the community in making a book on horses, the pencil writing on all but one of these papers showed on each the name of a bettor, the bets made on specified horses, and the amounts won or lost by that bettor on January 5, 1952, the date on

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which, in his opinion, the bets were made. [Rep. Tr. pp. 375-382, 421-424.] The sheet which was different was an accounting sheet. [Rep. Tr. p. 583.] In the opinion of an examiner of questioned documents [Rep. Tr. pp. 722-726], the handwriting on the 46 pieces of paper was that of Curti and Audie Greer. [Rep. Tr. pp. 760, 761.]

A small sheet of paper [People's Ex. 21], was found on top of the desk in the petitioner's house at the time of the arrest. [Rep. Tr. p. 424.] In the opinion of Officer Jacobsen it was a betting marker. At the top it had a capital "M" and a small "c." These letters, in his opinion, indicated the name of the player. On the left side was the letter "T," which, in his opinion, stood for Tropical, and Tropical was a racetrack where horse races were allegedly being run during the period of investigation here. [Rep. Tr. pp. 394, 425.] Following the "T" was a small dash and the figure "3," which indicated the third race at Tropical. Written in longhand was the name of the horse, "Dr. Ifroo." Immediately under the name "Dr. Ifroo" was "T-7," followed by the name of a horse, "Little Falls." Those two horses were grouped together with a bracket, which indicated that it was a parlay. [Rep. Tr. pp. 425, 426.] Following the names of the two horses were three figure "4's," indicating 4 to win, 4 to place and 4 to show, which was a parlay, in his opinion, from Dr. Ifroo in the third race at Tropical, to Little Falls in the 7th race at Tropical. Under these items was "C-2," and the name "Tingaling." In Officer Jacobsen's opinion the "C" stood for the California track running at the time, which was Santa Anita; the "2" for the second race; and "Tingaling" the horse bet on. Following that was the letter "x" followed by two figure "1's." In the opinion of Officer Jacobsen the "x" indicated that the

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person betting did not want to bet any money to win, but wanted to bet one dollar to place and one to show. [Rep. Tr. p. 426.] An identical series of entries was found on one of the 46 sheets of paper [People's Ex. 20], which were found in the desk drawer. At the top of those entries were the words "Mack" and "McComb." [Rep. Tr. pp. 426-428.] In the opinion of an examiner of questioned documents [Rep. Tr. pp. 722-726], the handwriting on the small sheet of paper [People's Ex. 21] was that of the appellant. [Rep. Tr. pp. 756, 757.]

Curti was arrested on the same evening that the petitioner was. [Rep. Tr. p. 347.] At that time the arresting officers took from him a racing form and several pieces of vertically and horizontally ruled papers on which there were pencilled writings [People's Ex. 16], which in the opinion of the examiner of questioned documents, had been made by Curti. [Rep. Tr. pp. 341, 347, 348, 759, 760.] One of the 46 sheets of paper found in the petitioner's home was a recapitulation of the figures on the sheets taken from Curti. [Rep. Tr. pp. 583, 584.] In the opinion of Officer Jacobsen, the notations on the papers taken from Curti were bets recorded on horse races. [Rep. Tr. p. 575.]

In the petitioner's home at the time of his arrest were also found a number of horizontally and vertically ruled sheets similar to others introduced into evidence, and spiral notebooks. [Rep. Tr. pp. 430, 433-435.] A daily racing form dated Saturday, January 5, 1952, on which there were pencilled notations, was found on the petitioner's bed. [Rep. Tr. pp. 434, 435.] An adding machine and a tape with figures on it were also found. [Rep. Tr. pp. 435-437.]

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Fluorescence on the Petitioner's Hands.

The officers asked the petitioner to put his hands under ultra-violet light to see whether or not they would fluoresce as the papers discovered in his home had. The petitioner did so, and laughed. His hands, when he held them under the light had the same green fluorescence as the papers had. [Rep. Tr. pp. 414-416, 524, 525, 710.]

The Los Alamitos House.

While Officer Jacobsen was at the petitioner's house on the night of the arrest, Officer Stovall telephoned to him from the house at Chestnut and Florista in Los Alamitos. [Rep. Tr. pp. 584, 630, 631.] He gave two telephone numbers to Officer Jacobsen. Officer Jacobsen then telephoned to 908976, and Officer Stovall answered the telephone. Jacobsen then called 81403 and Officer Stovall answered. [Rep. Tr. pp. 586, 631.]

In one room of the house at Chestnut and Florista in Los Alamitos were found two telephones, the numbers of which were 81403 and 908976, each with a cord approximately 70 feet long. [Rep. Tr. pp. 627-632.] On the night of January 5, 1952, officers found in that room a large number of ruled and numbered blank pieces of paper, a book entitled "Racing Parlay Manual," and one entitled "Parlay Payoff," a table model radio, a small adding machine, and numerous old scratch sheets. There was also a scratch sheet dated January 5, with pencilled writings on it, a ledger, horizontally and vertically lined papers having written notations on them, multicolored pencils and papers. [Rep. Tr. pp. 641-648.] In the opinion of Officer Jacobsen, the paraphernalia commonly used and employed by bookmakers in the community were

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telephones, radios, scratch sheets, racing forms, paper, pencils, racing manuals or racing parlay manuals, betting markers, wall sheets, television sets and adding machines. [Rep. Tr. pp. 383-385.]

The Wagering Tax Stamps.

At the police station after the petitioner's arrest, Officer Good removed from his wallet a paper labelled "Special Tax Stamp, Wagering," bearing the name "Irvine, Patrick E.," and the address "3916 E. Second Street, Long Beach, California," in typewriting, dated "11/5/51." [Rep. Tr. pp. 564-566.] It was offered into evidence at the trial. The introduction into evidence was objected to on the ground that the purchase of the stamp was charged as the first overt act of the conspiracy charged in Count I of the Information; that there was a federal law which the petition was complying with in purchasing it; and that therefore its purchase did not constitute an illegal act which was an overt act of the conspiracy. The objection was overruled and the stamp was received as People's Exhibit 36. [Rep. Tr. pp. 566, 567.]

The Wagering Tax Records.

Photostatic copies of documents, certified to as correct copies of documents in his files by the head of the Wage and Excise Tax Division of the Office of the Collector of Internal Revenue, were offered into evidence, and their introduction was objected to by the petitioner on the grounds that they were not the best evidence and there was no proof that the originals could not be acquired; that there was no proof of where they came from; and that there was no proof that they were actually signed by anyone concerned in the trial. The objections were over-

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ruled. [Rep. Tr. pp. 729, 730, 736, 737, 738-740.] In the opinion of an examiner of questioned documents, one of the documents, an application for a wagering tax stamp [People's Ex. 63], was signed by the petitioner. [Rep. Tr. pp. 740-742.] Others of such documents [People's Exs. 64, 65, 66] including tax returns for the period in question here, had, in the opinion of the examiner of questioned documents, been signed by the petitioner. [Rep. Tr. pp. 741, 742.] Others of the documents had, in the opinion of the examiner of questioned documents, been signed by Morris Lippe and Pete Curti, persons alleged in the information to have conspired with the petitioner to engage in bookmaking. [Clk. Tr. p. 1; Rep. Tr. pp. 742-745, 748-750; People's Exs. 67 (document dated November 1st only), 68, 71. 72.] Some of the documents were received as evidence only against alleged members of the conspiracy other than the petitioner. [Rep. Tr. pp. 745, 747, 748; People's Exs. 67 (document dated March 8, 1952), 69, 70.] The jury found each of the alleged conspirators not guilty of the conspiracy charged in Count I of the information. [Clk. Tr. pp. 26, 27.]

The Prosecution.

In an information filed by the District Attorney of Los Angeles County, the petitioner, along with Morris Lippe and Pete Emil Curti, was charged in Count I with conspiracy to violate California Penal Code, Section 337a, and it was alleged as an overt act that pursuant to the conspiracy the three defendants had purchased and obtained Special Wagering Tax Stamps [Clk. Tr. p. 1], along with other overt acts. [Clk. Tr. pp. 2, 3.] In Count II it was charged that they violated California Penal Code, Section 337a, subdivision 1, by willfully, un-

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lawfully and feloniously engaging in poolselling and bookmaking; in Count III it was charged that they violated California Penal Code, Section 337a, subdivision 2, by keeping premises at 10851 South Chestnut, Los Alamitos, and at 3916 East Second Street, Long Beach, with paraphernalia for the purpose of recording and registering bets on horse races; in Count IV they were charged with a violation of California Penal Code, Section 337a, subdivision 3, in receiving money and the equivalent and memorandum therefor in writing, which had been wagered or was to be wagered on horse races; and in Count V they were charged with a violation of California Penal Code, Section 337a, subdivision 4, in recording and registering bets on horse races. [Clk. Tr. pp. 2-4.]

Each defendant pleaded "Not Guilty as charged in each count of the information," and they were tried by a jury. [Clk. Tr. pp. 9-25.] The jury found each defendant not guilty of the conspiracy charged in Count I of the information, and found the appellant guilty of each of the other counts of the information. [Clk. Tr. pp. 26-29, 109-113.] His motion for a new trial was denied [Clk. Tr. p. 115], and judgment was entered as to all counts. He was sentenced to the county jail for one year on the conviction on Count II, and for six months for each other count. His sentence on Count III was ordered to run consecutively with that on Count II. Execution of sentence was suspended as to Counts III, IV and V, and he was granted probation for three years on those counts. [Clk. Tr. pp. 116, 117.]

The petitioner appealed to the District Court of Appeal, Second Appellate District, from the judgment and the order denying his motion for a new trial. The judgment was affirmed. (*People v. Irvine,* 113 Cal. App. 2d 460.)

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Summary of Argument.

I.

Congress has specifically provided that payment of wagering taxes does not exempt the person paying them from penalties imposed by State laws. Therefore, the petitioner could properly be penalized under State laws for engaging in wagering contrary to State law. Furthermore, the question of whether or not a person who pays the taxes imposed upon wagers and wagering by the United States Government is entitled to carry on the activity so taxed without interference from the State is not properly presented by the record, as it was not raised in nor passed upon by the highest State court.

II.

The freedom from compulsion to be a witness against oneself is not an element of due process of law guaranteed by the Fourteenth Amendment, and the guarantee thereof secured by the Fifth Amendment is not a guarantee against State action. Therefore, the use by a State court of evidence so secured is not by reason of such compulsion only, a denial of any constitutional right of the accused. (*Adamson v. California,* 332 U. S. 46, 53-54; *Twining v. New Jersey,* 211 U. S. 78, 99-114.)

The privilege against self-incrimination relates only to past acts. Therefore the petitioner in applying for and receiving a wagering tax stamp was not compelled by the federal government to incriminate himself, as the application and the stamp related only to acts which he might

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or might not do in the future. (*United States v. Kahriger,* 345 U. S. 22, 32-33; *United States v. Penn,* 111 Fed. Supp. 605, 606-607.)

As the wagering tax stamp, the application therefor, and the other records concerning the wagering tax were evidence resulting from a federal matter over which the state had no control, their use against the petitioner did not deprive him of any constitutional right not to be a witness against himself. (*Feldman v. United States,* 322 U. S. 487, 492-494.)

Further, the question of whether or not the introduction of the wagering tax stamp and records compelled the petitioner to be a witness against himself is not properly presented by the record, as no such claim was made at any step in the proceeding in the State court, and the matter was not passed upon by the highest State court.

III.

California Penal Code, Section 334, did not grant the petitioner immunity from the prosecution here, as the immunity granted by that section is granted to a witness as such who testifies for the prosecution. The petitioner here did not testify, and did not claim such immunity in the State court at any step in the proceeding. (*In re Petracus,* 12 Cal. 2d 579.)

Further, the question whether statutory immunity was or should have been granted to the petitioner by California Penal Code, Section 334, is not properly presented by the record, as no claim to such immunity was made

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in the State courts at any stage in the proceeding, and it is not a federal question of which this Court will take cognizance.

IV.

The evidence secured against the petitioner by the police was not secured by any means contrary to the fundamental principles of justice which inhere in our institutions. As it was otherwise competent, it was admissible in the California court even though it may have been obtained by improper or illegal means. (*People v. Gonzales,* 20 Cal. 2d 165, 168-171; *People v. Mayen,* 188 Cal. 237, 240-257; *Schwartz v. Texas,* 344 U. S. 199, 201; *Wolf v. Colorado,* 338 U. S. 25, 33.) The search and seizure at the time of the arrest was a reasonable search and seizure.

V.

As no wires were tapped, nor telephone communications intercepted, no question arises as to the application of 47 U. S. C., Section 605, or California Penal Code, Section 640. (*Goldman v. United States,* 316 U. S. 129, 133-134; *People v. Sica,* 112 Cal. App. 2d 574, 586.) Even though telephone communications had been intercepted, the evidence secured by such acts would have been admissible against the petitioner. (*Schwartz v. Texas,* 344 U. S. 199; *People v. Channell,* 107 Cal. App. 2d 192, 198-199.)

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ARGUMENT.

I.

Payment of the Federal Wagering Taxes Does Not Exempt the Person Paying Them From Any Penalty Imposed by a State for Wagering.

A. Congress Has Specifically Provided That Payment of Wagering Taxes Does Not Exempt the Person Paying Them From Penalties Imposed by State Laws.

The petitioner contends that as Congress has lawfully imposed a tax on the occupation of wagering, it has thereby made that occupation impervious to State regulation, because, he insists, the State is forbidden to burden the taxing power of the federal government without the specific consent of Congress, which he asserts has not been given.

Chapter 27A of the Internal Revenue Code imposes a tax of 10% on wagers (26 U. S. C., Sec. 3285), and requires that a special tax of $50.00 a year shall be paid by each person liable for the 10% tax or who is engaged in receiving wagers on behalf of any person so liable. (26 U. S. C., Sec. 3290.) The same chapter makes applicable (26 U. S. C., Sec. 3292) a provision that payment of the $50.00 special tax on the occupation of wagering "shall not be held to exempt any person from any penalty or punshment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State . . ." (26 U. S. C., Sec. 3276.)

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It provides also that "payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law . . . of any State for engaging in the same activity, . . ." (26 U. S. C., Sec. 3297.)

Congress has, therefore, by the provisions set forth above, specifically disclaimed any intention to interfere with the State's rights to regulate and prohibit wagering within the State, and the petitioner's contention that it has not consented to such regulation and prohibition is contrary to the fact.

In the *License Tax Cases,* 5 Wall. 462, the controversy arose out of indictments for selling lottery tickets and retailing liquor without having first got and paid for a license as provided by an Internal Revenue Act of Congress. It was argued that a license to carry on those activities gave authority to carry them on; that the activities were part of the internal trade of the State in which they were carried on; that the internal trade of the State was not subject to legislation by Congress and could not be licensed or prohibited by its authority; that licenses for such activities granted under the Act of Congress were therefore null and void; and that penalties for carrying on such activities without a license were unconstitutional. The court there pointed out that where Congress has constitutional power to regulate trade or intercourse, such as the power to regulate commerce with foreign nations and among the several states, it might do so by means of licenses, and that in those cases the license would give

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the licensee authority to do whatever was authorized by its terms. It distinguished the situation involving the internal commerce or domestic trade of the States, and recognized that Congress had no power of regulation nor direct control over it, except as was incidental to the exercise of powers clearly granted to it, such as the power to tax, which was concerned here. (5 Wall. 462, 470-471.) In determining that the Internal Revenue Act conveyed to the licensee no authority to carry on the licensed business within the State, the court stated:

> ". . . Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a State in order to tax it.
>
> "If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution.
>
> "But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of im-

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posing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it." (5 Wall. 462, 471.)

In *Pervear v. The Commonwealth,* 5 Wall. 475, decided immediately following the *License Tax Cases* (5 Wall. 462), *supra,* the plaintiff in error was indicted in the State court for keeping a tenement for the illegal sale of intoxicating liquors, contrary to the law of the State. He pleaded that he had a license from the United States under the Internal Revenue Acts of Congress to do the acts for which he was indicted. The court held, applying the rule of the *License Tax Cases* (5 Wall. 462), *supra,* that the sale of liquors within the State was subject exclusively to State control, and that the license secured under the acts of Congress conveyed no authority to carry on the business within the State.

It need not be determined here whether or not Congress is constitutionally impowered to regulate as well as tax, and so authorize the occupation of wagering within the States, because Congress has not attempted to do so. (*United States v. Kahriger,* 345 U. S. 22, 26-27.) Rather, it has expressly provided that the payment of the taxes imposed by it on wagering shall not exempt any person carrying on the business of wagering from any penalty or punishment provided by State laws for doing so (26 U. S. C., Sec. 3297), and that payment of the $50.00 tax on those engaged in receiving wagers does not authorize the carrying on of such activity contrary to State law. (26 U. S. C., Secs. 3276, 3292.)

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B. The Question of Whether or Not a Person Who Pays the Federal Taxes on Wagers and Wagering Is Entitled to Carry on That Activity Without Interference From the States Is Not Properly Presented by the Record.

The federal question put forward by the petitioner is whether or not the laws of the State prohibiting wagering must, by virtue of Article VI of the United States Constitution, give way to the Act of Congress taxing wagering. This question was mentioned in the trial court in connection with an objection to the introduction of evidence of conversations emanating from the petitioner's home through a concealed microphone on the ground that the evidence was secured by a violation of the Fourth and Fourteenth Amendments. The fact that a wagering stamp had been issued to the petitioner was said to involve a federal question in the case at trial, which would make the doctrine of the case of *Rochin v. California,* 342 U. S. 165, applicable. The objection to the evidence was overruled. [Rep. Tr. pp. 110-119.] Introduction into evidence of a wagering tax stamp issued to Morris Lippe, an alleged co-conspirator, which was found in the petitioner's home, was objected to on the ground that it showed an act condoned by the United States Government. The objection was overruled. [Rep. Tr. pp. 428, 429.] The introduction into evidence of the wagering tax stamp issued to Patrick E. Irvine, which was found in the petitioner's wallet after his arrest, was objected to on the ground that the purchase of the stamp was charged as the first overt act of the conspiracy charged in Count

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I of the information; that there was a federal law which the petitioner was complying with in purchasing it, and that therefore its purchase did not constitute an illegal act which was an overt act of the conspiracy. The objection was overruled and the stamp was received as People's Exhibit 36. [Rep. Tr. pp. 566, 567.] The jury trying the case was instructed as to what was required by the federal laws taxing wagering, and told that the payment of the tax did not exempt any person from any penalty or punishment provided by the laws of the State, as the special tax stamp was not a license or permit. [Clk. Tr. pp. 72, 73.] The question was not again presented in the State courts or decided by them, either on motion for new trial, on appeal to the District Court of Appeal for the State of California, Second Appellate District, Division Two, on petition for rehearing by that court, or on petition for hearing by the California Supreme Court, as would have been possible. (See *People v. Harrington,* 42 Cal. 165.) Neither does it appear to have been presented on a petition for a writ of habeas corpus, which is a proper way to raise the question of the constitutionality of a State statute under which one is being punished. (*In re Bell,* 19 Cal. 2d 488, 492-495.) The denial of the claim was urged specifically in the Petition for Certiorari filed in this court, but, we submit, that was too late, and that there is no occasion for this court to consider the question. (*Capterton v. Bowyer,* 14 Wall. 216, 234-236; *Hulburt v. Chicago,* 202 U. S. 275, 280-281; *Hiawasee River Power Co. v. Carolina-Tennessee Power Co.,* 252 U. S. 341, 343-344; *Chicago, Indianapolis & Louisville Railway Co. v. McGuire,* 196 U. S. 128.)

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II.

The Petitioner Was Not Compelled by the State to Be a Witness Against Himself, and No Right Guaranteed to Him by the Fifth or Fourteenth Amendments Was Denied Him by the Use of Federal Wagering Tax Records as Evidence Against Him.

A. The State Did Not Deny the Petitioner the Due Process of Law.

The petitioner contends that he was compelled by the federal law taxing those engaged in the occupation of wagering to make a declaration that he was engaged in that business, and that the use of such declaration and the Special Tax Stamp issued pursuant thereto, as evidence against him in the prosecution by the State for wagering constituted a denial to him of the due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, because he was forced to incriminate himself.

(1) The Freedom From Compulsion to Be a Witness Against Oneself Is Not an Element of Due Process of Law.

The freedom from compulsion to be a witness against oneself is not an element of due process of law guaranteed by the Fourteenth Amendment, and the guarantee thereof secured by the Fifth Amendment is not a guarantee against State action. The use by a State of evidence so secured is not by reason of such compulsion alone, a denial of any constitutional right of the accused. (*Twining v. New Jersey,* 211 U. S. 78, 99-114; *Adamson v. California,* 332 U. S. 46, 53-54; and see *Feldman v. United States,* 322 U. S. 487, 492-494; *United States v. Murdock,* 284 U. S. 141, 149.)

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(2) THERE WAS NO SELF-INCRIMINATION WITHIN THE MEANING OF THE FIFTH AMENDMENT HERE.

The privilege against self-incrimination relates only to past acts. The federal wagering tax statutes merely impose conditions upon the right to engage in the business of receiving wagers in the future, and the disclosures required thereby do not constitute self-incrimination within the meaning of the Fifth Amendment, even though they tend to incriminate the person making them under State law. (*United States v. Kahriger,* 345 U. S. 22, 32-33; *United States v. Forrester* (D. C. Ga.), 105 Fed. Supp. 136, 138.)

(3) THE PETITIONER WAS GRANTED THE DUE PROCESS OF LAW REQUIRED BY THE FOURTEENTH AMENDMENT.

In setting forth the requirements of the due process clause of the Fourteenth Amendment, the court in *Rochin v. California,* 342 U. S. 165, stated at page 169:

> ". . . Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Commonwealth of Massachusetts, 291 U. S. 97, 105, or are 'implicit in the concept of ordered liberty.' Palko v. State of Connecticut, 302 U. S. 319, 325."

In *Feldman v. United States,* 322 U. S. 487, it was held that the admission of testimony previously given by the accused in proceedings in a State court designed to aid in the discovery of assets of a debtor, did not deprive the accused of the right to refuse to be a witness against

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himself in a prosecution by the federal government for using the mails to further a fraudulent scheme, even though such testimony could not have been used against him in a State proceeding because of immunity which was granted by State statutes. It was there stated, at 322 U. S. 487 at 493:

> ". . . The immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction. Otherwise the criminal law of the United States would be at the hazard of carelessness or connivance in some petty civil litigation in any state court, quite beyond the reach even of the most alert watchfulness by law officers of the government."

It was not suggested in the *Feldman* case, 322 U. S. 487, *supra,* that the appellant was being denied the due process of law guaranteed to him by the Fifth Amendment, even though the federal government used evidence which the defendant had been compelled by the State to give.

And see:

United States v. Murdock, 284 U. S. 141, 149;
Brown v. Walker, 161 U. S. 591, 606-608;
Jack v. Kansas, 199 U. S. 372, 380-382.

26 U. S. C., Section 3275, made applicable to those who pay wagering taxes by 26 U. S. C., Section 3292, provides that each Collector shall place and keep in his office, for public inspection, a list of the names of all persons who pay the tax, and the time, place and business for which the tax has been paid. It also provides that he shall furnish a certified copy thereof, as of a public record, upon application of any prosecuting officer.

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In a great many decisions of State courts, decided during a period of over thirty years, it was held in prosecutions for violating state laws prohibiting or regulating the sale or keeping of intoxicating liquor, almost without exception, that evidence that the accused had a United States special internal revenue stamp showing payment of the federal tax on liquor dealers, or other evidence that he had paid the tax, was admissible to show violation of the State laws,[1] and, indeed, in some states statutes made possession of such revenue tax stamp *prima facie* evidence of the sale or keeping of prohibited liquor.

We submit that the use of such evidence, approved by the courts of at least twenty-five states, and to some de-

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[1]See, *e. g.*, Alabama: *Roden v. State*, 3 Ala. App 199; *Baker v. State*, 5 Ala. App. 156; *Strange v. State*, 5 Ala. App. 164; *Warrick v. State*, 8 Ala. App. 391; *Tarpey v. State*, 8 Ala. App. 432; Arizona: *Birch v. State*, 19 Ariz. 366. Arkansas: *Siebert v. State*, 121 Ark. 258. Georgia: *Huckabee v. State*, 7 Ga. App. 677; *Christian v. State*, 9 Ga. App. 61; *Cassidy v. State*, 10 Ga. App. 123; *Jackson v. State*, 10 Ga. App. 142; *Daniel v. State*, 11 Ga. App. 199. Illinois: *People v. Brown*, 273 Ill. 169. Kansas: *State v. Nippert*, 74 Kan. 371; *State v. Dollar*, 88 Kan. 346; *City of Topeka v. Briggs*, 90 Kan. 843. Kentucky: *King v. Commonwealth*, 143 Ky. 125. Louisiana: *State v. Donato*, 127 La. 394. Maine: *State v. O'Connell*, 82 Me. 30; *State v. Howard*, 91 Me. 396. Maryland: *Guy v. State*, 90 Md. 29. Massachusetts: *Commonwealth v. Uhrig*, 146 Mass. 132. Michigan: *People v. Lalonde*, 171 Mich. 286. Mississippi: *Burnett v. State*, 72 Miss. 994. Missouri: *State v. Sexton*, 141 Mo. App. 694; *State v. Parkel*, 185 Mo. App. 70. Nebraska: *Fruide v. State*, 66 Neb. 244. New Hampshire: *State ex rel. Bartlett v. Davis*, 69 N. H. 350. North Carolina: *State v. Dowdy*, 145 N. C. 432. North Dakota: *State v. Kilmer*, 31 N. D. 442. Ohio: *Folliard v. State*, 32 Ohio Cir. Ct. R. 481. Oklahoma: *Billingsley v. State*, 4 Okl. Cr. 597; *Hargrove v. State*, 8 Okl. Cr. 487; *Moulder v. State*, 10 Okl. Cr. 252. Rhode Island: *State v. Mellor*, 13 R. I. 666. Tennessee: *Diamond v. State*, 123 Tenn. 348; *Brinkley v. State*, 125 Tenn. 371. Texas: *Pitner v. State*, 37 Tex. Cr. R. 268; *Columbo v. State*, 65 Tex. Cr. 608. West Virginia: *State v. Nethken*, 60 W. Va. 673. Vermont: *State v. Spaulding*, 60 Vt. 228; *State v. White*, 70 Vt. 225. Virginia: *Runde v. Commonwealth*, 108 Va. 873.

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gree furnished by the tax collector as a public record (26 U. S. C., Sec. 3275), cannot be said to flout the constitutional guarantee of respect for personal immunities which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," or are "implicit in the concept of ordered liberty." Nothing compels a person to engage in the occupation of wagering, for which the federal tax must be paid and the tax stamp secured. Therefore, one who chooses to do so and to apply for and secure the stamp does so voluntarily, and the information he gives in so doing is given without compulsion. No element of due process forbids, we submit, the use against him of evidence voluntarily furnished, such as that on the federal tax stamp application, and the stamp. (See: *Tucker v. United States,* 151 U. S. 164, 168-169; *Perlman v. United States,* 247 U. S. 7.) Therefore, the court here did not deny the petitioner the due process of the law in admitting such application and stamp.

B. The Question of Whether or Not the Introduction of the Wagering Tax Records Compelled the Petitioner to Be a Witness Against Himself or Denied Him Due Process Is Not Properly Presented by the Record, as No Such Question Was Raised at Any Step in the Proceedings in the State Court.

The question of whether or not the introduction of the wagering tax records compelled the petitioner to be a witness against himself or denied him the due process of law, is not properly presented to this court for consideration. Such question was never raised in the California courts at any step in the proceedings, and was never passed upon by any court in that State.

The only question of self-incrimination there raised was with regard to whether or not asking the appellant to put

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his hands under an ultra-violet lamp, which he did laughingly, and which resulted in evidence that they showed the presence of fluorescent powder which had previously been put upon certain betting markers, compelled him to be a witness against himself. It was held that he acted voluntarily and was not compelled to do anything. (*People v. Irvine,* 113 Cal. App. 2d 460, 463.)

The only objection to the introduction of the wagering tax stamp into evidence was on the ground that the first overt act charged in support of the conspiracy was the purchase of the stamp; and that in buying it the petitioner was complying with the federal law; that it was not an illegal act; and that it was, therefore, not an overt act in the conspiracy. The objection was overruled. [Rep. Tr. pp. 566, 567.] The petitioner was found not guilty of the conspiracy. [Clk. Tr. pp. 26, 109.]

A photostatic copy of the application for the wagering stamp, certified to be a correct copy of a document in his files by the head of the Wage and Excise Tax division, was marked for identification as People's Exhibit 63 for identification, and an examiner of questioned documents was asked if he had studied it. An objection to the witness testifying from the photostat was made on the ground that it was a copy and not the best evidence, and there was no proof that the original could not be acquired; and that while it appeared to be a government report of some kind, there was no identification as to where it came from, when it was issued, or if it was issued in the regular and due course of business in taxation or tax stamps. [Rep. Tr. pp. 729, 730.]

It was pointed out that the document had not been offered into evidence yet. A further objection was made

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to the deputy district attorney's reading the document into the record. After some discussion of that objection, the objection was overruled. [Rep. Tr. p. 730.] Subsequently, the examiner of questioned documents was asked for his opinion with respect to the handwriting on the application as compared with that on some exemplars. The question was objected to on the ground that the witness was not qualified as an expert. The objection was overruled, and a continuing objection to the witness' opinion evidence was allowed. A further objection was made that the photostatic copy was not the best evidence. [Rep. Tr. pp. 736, 737.] The application [People's Ex. 63] and other tax records were received into evidence. [People's Exs. 64-74; Rep. Tr. p. 738.]

The petitioner was allowed a continuing objection to them. He moved to strike the exhibits on the ground that it had not been proved that they were in the handwriting of any of the defendants. The court denied the motion, and subsequently the examiner of questioned documents testified that in his opinion the application had been signed by the petitioner. [Rep. Tr. pp. 740, 741.]

At no time was any objection to the introduction of the stamp and the application therefor made on the ground that they forced the petitioner to be a witness against himself, or that they denied him due process of the law. No complaint upon any ground was made to the appellate courts over the admission of these documents into evidence. Therefore, we submit, as the federal question concerning the admission of the wagering tax stamp and the application therefor into evidence was not presented to the highest court in California, it is not properly pre-

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sented to this court for consideration. (*Caperton v. Bowyer*, 14 Wall. 216, 234-236; *Hulburt v. Chicago*, 202 U. S. 275, 280-281; *Hiawasee River Power Co. v. Carolina-Tennessee Co.*, 252 U. S. 341, 343-344; *Chicago, Indianapolis & Louisville Railway Co. v. McGuire*, 196 U. S. 128.)

III.

The Petitioner Was Not Granted Immunity From Prosecution by State Law.

A. California Penal Code, Section 334, Grants Immunity From Prosecution Only as to Matters Testified to by a Witness for the Prosecution.

The petitioner asserts that his wagering tax stamp and application therefor, as well as evidence of his statements which were heard through a microphone which had been placed in his house without his knowledge, and were testified to by police officers, were his own testimony, and that the introduction thereof into evidenec by the prosecution granted him immunity from the prosecution by virtue of the provisions of California Penal Code, Section 334, which is as follows:

> "No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified."

The Supreme Court of California, in the case of *In re Petraeus*, 12 Cal. 2d 579, held that Penal Code, Section 334, *supra*, applies only to a witness called by the prosecution, as in such case alone that compulsion is present

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which is a necessary element of the immunity system prescribed by the laws. It pointed out that it was not the legislative purpose in enacting the law to extend the immunity to situations wherein the State is assumed to have bargained to give all without any return, forgetting the *quid pro quo* in the matter of granting immunity; namely, information leading to the arrest and conviction of offenders.

The petitioner was not a witness at his trial, and he was not compelled by the State to make the application for the wagering tax stamp or to receive the stamp, nor was he compelled to produce those documents or identify them. He did not claim immunity in the State courts by virtue of this statute. Any assumption that the State by introducing the documents into evidence had thereby granted immunity to the petitioner for the very crimes for which he was on trial would be an unwarranted extension of the statutory immunity beyond the scope intended by the legislature in enacting Penal Code, Section 334. (*In re Petraeus* (12 Cal. 2d 579), *supra.*)

No question of self-incrimination arises respecting the conversations heard over the microphone. There was no evidence of compulsion to induce the petitioner to talk. He and his co-defendants were voluntarily transacting business without knowledge of the fact that they were being overheard through the microphone. This is not self-incrimination within the Fifth Amendment (*Olmstead v. United States,* 277 U. S. 438, 462), and it is not testimony of the petitioner as a witness for the prosecution such as grants him immunity under California law. (*In re Petraeus* (12 Cal. 2d 579), *supra.*)

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B. There Is No Federal Question Involved in Whether or Not the Petitioner Was or Should Have Been Granted Immunity by California Penal Code, Section 334.

> ". . . Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the state. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' These principles are applicable alike in all the states and do not depend upon or vary with local legislation." (*Hebert v. Louisiana*, 272 U. S. 312, 316-317.)

Thus, whether or not the State immunity statute was applicable here was a State question, the final decision of which rested with the courts of California. The question of whether or not the petitioner was or should have been immune from the prosecution because of Penal Code, Section 334, was not raised at any step in the proceedings in the California courts. No court of the State was asked to or did rule on the applicability of the statute to the situation here. Under these circumstances, we submit that there is no occasion for this court to consider the matter. (*Hebert v. Louisiana* (272 U. S. 312), *supra.*)

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IV.

The Due Process Clause of Neither the State nor Federal Constitution Prohibited the Use of the Evidence Obtained by Entering the Petitioner's House and Placing a Microphone Therein and Thereafter Listening to People Talking Within the House; or by Placing Fluorescent Powder Upon Betting Markers in the Hands of Another Person, and Thereafter at the Time of the Petitioner's Arrest, Showing That There Was Fluorescent Powder on His Hands.

At the request of the police, a keysmith went to the appellant's home and made a key to the front door. [Rep. Tr. pp. 516-519.] Thereafter the police and a recording engineer entered the house in the absence of the appellant and installed a microphone in the hall. The microphone was connected to a recording machine and a loudspeaker some distance away. [Rep. Tr. pp. 31-34.] There was nothing connected to the telephone instrument or lines, and the equipment which was installed was not capable of transmitting what was said by someone telephoning into the house, unless they spoke so loudly that it could be heard in the house itself as it came out of the receiver. It was capable of transmitting what was said by anyone talking in the house, whether into the telephone or not. [Rep. Tr. pp. 50, 51.] Twice subsequently they entered the house and changed the location of the microphone. [Rep. Tr. pp. 35, 36.] The police listened to voices emanating from the house, through the microphone and loudspeaker. [Rep. Tr. pp. 159, 163-167, 229-231, 234-265.] At times they heard a telephone ringing or being dialed, and the appellant alone talking [Rep. Tr. pp. 234-237, 239-241, 243, 244, 247-249, 255-260, 265], and once Curti talking. [Rep. Tr. p. 63.]

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Subsequently, the police, by pretending to look for a robber, stopped the car driven by one of the petitioner's co-defendants and, without his knowledge, placed powder, which fluoresced under ultra-violet rays, upon betting markers found in his car. [Rep. Tr. pp. 153-156, 338-347, 401-409, 416-419.] He was then allowed to go on his way [Rep. Tr. p. 409], and shortly afterwards he was heard talking in the petitioner's house. [Rep. Tr. p. 29.] The police then entered the petitioner's house with their key and arrested him. [Rep. Tr. pp. 410, 515, 516, 703.] They asked him to put his hands under a portable ultra-violet lamp which they brought in, and, laughing, he did so. Fluorescence showed on his hands. [Rep. Tr. pp. 414-416, 524, 525.]

The police officers testified to the conversations concerning bookmaking which they had heard over the loudspeaker, and about the fluorescent powder put on the betting markers and found on the petitioner's hands. [Rep. Tr. pp. 228, 236, 237, 240-248, 250, 252, 254-265, 414-416.]

The petitioner asserts that the entry of the officers into the house was for the purpose of wire tapping, which is a felony in California (Cal. Penal Code, Sec. 640), and which is also forbidden by federal law. (47 U. S. C., Sec. 605.) He contends that therefore the entry was burglarious, because it was for the purpose of committing a felony (Cal. Penal Code, Sec. 459), and that the use of evidence secured by means of such a crime is so shocking as to violate the fundamental principles of justice that inhere in our institutions, and for that reason should have been excluded from evidence. He also contends that faking the arrest of the petitioner's co-defendant in

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order to put fluorescent powder on his betting markers, and subsequently entering the petitioner's house without his consent and compelling him to exhibit his hands to them, was conduct on the part of the officers so "offensive to human dignity in securing evidence from a suspect" as to be forbidden by the Fourteenth Amendment to the Constitution and its use ostracized. (App. Op. Br. pp. 42-50.)

It should be noted first that there was no evidence whatsoever that the police tapped any telephones, or attempted or intended to, or that any of the evidence presented was secured by intercepting telephone communications by wire tapping. The evidence shows that there was nothing connected to the telephone instrument or lines, and that the equipment which was installed was not capable of transmitting what was said by those telephoning to the petitioner's house, unless the voice came out of the receiver so loud that it would be picked up by the microphone in the room. [Rep. Tr. pp. 50, 51.] Police Officer Hermansen, who testified to almost all of the conversations heard over the loudspeaker, testified that he had never heard both ends of any telephone conversation from the petitioner's home. [Rep. Tr. p. 272.] No other witness testified that he had heard both ends of any such conversation, nor testified to both ends. The evidence shows only that the police heard, through the microphone installed in the petitioner's house, a telephone ringing or being dialed, and then a voice talking, on several occasions. Listening to the words spoken into the telephone receiver, in the absence of a physical connection with the telephone wires, is not an interception of a wire communication within the meaning of 47 U. S. C., Section 605

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(*Goldman v. United States*, 316 U. S. 129, 133-135), nor within the meaning of California Penal Code, Section 640. (*People v. Sica*, 112 Cal. App. 2d 574, 586.)

A. In California, Evidence Otherwise Competent Is Not Rendered Inadmissible by the Fact That It Might Have Been Obtained by Improper or Illegal Means. Evidence Obtained by Unreasonable or Unlawful Search and Seizure Is Admissible in California Courts.

The rule is well settled in California that evidence otherwise competent is not inadmissible because it has been obtained by improper or illegal means. Therefore, evidence obtained by unreasonable or unlawful search and seizure is admissible in California courts.

In the case of *People v. Gonzales*, 20 Cal. 2d 165, police officers, without warrants, entered the defendant's apartment during his absence and took therefrom certain evidence of a conspiracy to commit grand theft. Thereafter, the defendants were charged with that crime. Before the trial they got an injunction against the use of the evidence, but at the trial, the court refused to enforce the injunction and admitted the evidence in question. The California Supreme Court held that the evidence was admissible, declaring (20 Cal. 2d 165, 168-171):

> "The Fourth Amendment to the Constitution of the United States prohibits unreasonable searches and seizures by federal officers. Pursuant to this mandate the federal courts forbid the introduction in court of evidence obtained by an illegal search or seizure if a timely motion for its exclusion is made by the accussed. (Byars v. United States, 273 U. S. 28 (47 S. Ct. 248, 71 L. Ed. 520); Go-Bart Importing Co. v. United States, 283 U. S. 344 (51 S. Ct. 153, 75 L. Ed. 374); Gouled v. United States, 252

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U. S. 298, 302 (41 S. Ct. 261, 65 L. Ed. 647); Silverthorne Lumber Co. v. United States, 251 U. S. 385 (40 S. Ct. 182, 64 L. Ed. 319); Boyd v. United States, 116 U. S. 616 (6 S. Ct. 524, 29 L. Ed. 746); Weeks v. United States, 232 U. S. 383 (34 S. Ct. 341, 58 L. Ed. 652); Nardone v. United States, 308 U. S. 338 (60 S. Ct. 266, 84 L. Ed. 307); Ex parte Jackson, 96 U. S. 727, 733 (24 L. Ed. 877); Amos v. United States, 252 U. S. 313 (41 S. Ct. 266, 65 L. Ed. 654); Agnello v. United States, 269 U. S. 20 (46 S. Ct. 4, 70 L. Ed. 145).) The California Constitution contains an identical provision (Cal. onst., art. I, sec. 19), but the accepted rule in this state, as in many others, permits the introduction of improperly obtained evidence on the ground that the illegality of the search and seizure does not affect the admissibility of the evidence. (People v. Mayen, 188 Cal. 237 (205 Pac. 435, 24 A. L. R. 1383); *In re* Palizzotto, 188 Cal. 410 (205 Pac. 676); People v. Le Doux, 155 Cal. 535 (102 Pac. 517); Herrscher v. State Bar, 4 Cal. (2d) 399 (49 P. (2d) 832). See cases cited in 88 A. L. R. 348.) The defendant may have civil and criminal remedies against the officers for their illegal acts (see Pen. Code, sec. 146; Silva v. MacAuley, 135 Cal. App. 249 (26 P. (2d) 887, 27 P. (2d) 791); Ryan v. Crist, 23 Cal. App. 744 (139 Pac. 436); 15 So. Cal. L. Rev. 139, 141 *et seq.*), but the state is not precluded from using the evidence obtained thereby.

"The Fourth Amendment to the Constitution of the United States is not a limitation upon the states (National Safety Deposit Co. v. Stead, 232 U. S. 58 (34 S. Ct. 209, 58 L. Ed. 504); Ohio v. Dollison, 194 U. S. 445 (24 S. Ct. 703, 48 L. Ed. 1062)), and California is free to interpret its own Constitution. Defendants contend, however, that the prohibition in

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the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law. Not all of the first ten amendments to the federal Constitution, however, fall within the concept of due process of law. (Palko v. Connecticut, 302 U. S. 319 (58 S. Ct. 149, 82 L. Ed. 288); Twining v. New Jersey, 211 U. S. 78 (29 S. Ct. 14, 53 L. Ed. 97); Snyder v. Massachusetts, 291 U. S. 97 (54 S. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 575); See 39 Harv. L. Rev. 431; 24 Harv. L. Rev. 366.) In the determination of whether the prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be distinguished from the introduction in court of the evidence obtained as a result thereof. 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures' may be so fundamental as to make any unreasonable search and seizure by a public officer a violation of due process of law. It does not necessarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to fundamental principles of liberty and justice as to constitute a denial of due process of law. A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial. (See cases cited in 16 C. J. S., pp. 1185 *et seq.*) There is a failure to observe 'that fundamental fairness essential to the very concept of justice' when a trial is but a pretense (Lisenba v. California, 314 U. S. 219,

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236 (62 S. Ct. 280, 290, 86 L. Ed. .....)), as a trial dominated by a mob (Moore v. Dempsey, 261 U. S. 86 (43 S. Ct. 265, 67 L. Ed. 543)), or when the defendant is denied the right to counsel (Johnson v. Zerbst, 304 U. S. 458 (58 S. Ct. 1019, 82 L. Ed. 1461)), or when his conviction results from testimony known by the prosecution to be perjured. (Mooney v. Holohan, 294 U. S. 103 (55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406)) or from an involuntary confession obtained through coercion or torture. (Chambers v. Florida, 309 U. S. 227 (60 S. Ct. 472, 84 L. Ed. 716); Brown v. Mississippi, 297 U. S. 278 (56 S. Ct. 461, 80 L. Ed. 682).) While the United States Supreme Court has held that the due process clause includes the guarantee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a confession obtained by coercion or torture (Chambers v. Florida, *supra;* Brown v. Mississippi, *supra;* Lisenba v. California, *supra.* See Bram v. United States, 168 U. S. 532 (18 S. Ct. 183, 42 L. Ed. 568)), it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. (Chambers v. Florida, *supra;* Brown v. Mississippi, *supra;* Lisenba v. California, *supra; cf.* Twining v. New Jersey, *supra.*) The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. (People v. Defore, 242 N. Y. 13 (150 N. E. 585); People v. Mayen, *supra;* Com. v. Donnelly, 246 Mass. 507 (141 N. E. 500); Johnson v. State, 152 Ga. 271 (109 S. E. 662, 19 A. L. A. 641).) The fact that an officer acted improperly in obtaning evidence presented at the trial in no way precludes the court

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> from rendering a fair and impartial judgment. It has long been an established rule of evidence that 'the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.' (8 Wigmore, Evidence (3rd ed.), sec. 2183, p. 5, and cases there cited.)"

Stated otherwise, the California courts have consistently held that the Fourth Amendment to the Constitution of the United States, relating to searches and seizures, applies only to the Federal Government and its agencies, and that evidence obtained in violation of Article I, Section 19 of the California Constitution, which prohibits unreasonable searches and seizures, is admissible in California courts, for, they declare, where competent evidence is produced on a trial, the courts will not stop to inquire or investigate the source from whence it came or the means by which it was obtained.

People v. Mayen, 188 Cal. 237, 240-251.[1]

Illegally obtained evidence is admissible in California courts whether it is taken from the defendant's premises

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[1]Accord: *People v. Kelley,* 22 Cal. 2d 169, 172-173; *Herrscher v. State Bar,* 4 Cal. 2d 399, 412; *In re Polizzotto,* 188 Cal. 410, 411; *People v. LeDoux,* 155 Cal. 535, 547; *People v Allen,* 115 Cal. App. 2d 745, 747; *People v. Curley,* 114 Cal. App. 2d 577, 582-583; *People v. Channell,* 107 Cal. App. 2d 192, 199; *Oil Workers' International Union v. Superior Court,* 103 Cal. App. 2d 512, 578-580; *People v. Raffington,* 98 Cal. App. 2d 455, 457; *People v. Harmon,* 89 Cal. App. 2d 55, 58; *People v. Richardson,* 83 Cal. App. 2d 302, 305; *People v. Jackson,* 80 Cal. App. 2d 386, 391; *People v. Chait,* 69 Cal. App. 2d 503, 552; *People v. Peak,* 66 Cal. App. 2d 894, 904-905; *People v. Beilfuss,* 59 Cal. App. 2d 83, 87-88; *People v. Wong Toy,* 131 Cal. App. 455, 456; *People v. Guido,* 93 Cal. App. 478, 479; *People v. Eiseman,* 78 Cal. App. 667, 669; *People v. Warren,* 12 Cal. App. 730, 732; *People v. Swaile,* 12 Cal. App. 192, 196.

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(*In re Polizzotto*, 188 Cal. 410, 411; *People v. Orcck*, 74 Cal. App. 2d 215, 217-218) or from his person. (*People v. Wren*, 59 Cal. App. 116, 117; *People v. Martin*, 70 Cal. App. 271.)

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." (*Wolf v. Colorado*, 338 U. S. 25, 27-28.)

California accepts this concept as binding and acknowledges that its citizens are entitled to have this guarantee adequately protected by the laws of California.

In securing this guarantee to citizens, the federal government has since 1914 by virtue of the *Weeks* case, 232 U. S. 383, secured these rights to citizens by forbidding the introduction into evidence in federal courts of material obtained as a result of an illegal search and seizure.

California has consistently refused to follow the rule of the *Weeks* case, 232 U. S. 383, *supra*.

From *People v. Mayen*, 188 Cal. 237, to *People v. Gonzales*, 20 Cal. 2d 165, the California courts have admitted in evidence material obtained as a result of illegal search.

Not only have the California courts rejected the *Weeks* doctrine, but the California legislature has joined in that rejection. Mr. Justice Carter in his dissenting opinion in the *Rochin* case (*People v. Rochin*, 101 Cal. App. 2d at p. 144) emphatically announced:

> ". . . I am asking the Legislature of California to enact legislation which will force the courts of this state to uphold the constitutional provisions (U. S.

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Const., 4th Amend.; Cal. Const., art I, sec. 19) guaranteeing the right of privacy to residents of this state."

Mr. Justice Carter asked and the legislature rejected the request.

Three bills were introduced in the 1951 Legislature which would have in effect made the rule in the *Weeks* case, 232 U. S. 383, *supra,* the rule in California. None of the bills was enacted into law.

The Supreme Court of the United States in *Wolf v. Colorado,* 338 U. S. 25, after a full review of the entire subject held that although the guarantees are binding on the states, the failure on the part of a state to implement these guarantees by the adoption of the rule in the *Weeks* case, 232 U. S. 383, *supra,* did not constitute a deprivation of due process. This rule was repeated in *Stefanelli v. Minard,* 342 U. S. 117.

The reason underlying the difference between the federal (as expressed in the *Weeks* case) and the state rule (as allowed in the *Wolf* case, 338 U. S. 25, *supra*), finds its basis in history.

The early common law did not recognize search warrants, but they crept into the law, as it is said, by "imperceptible degrees" for the purpose of searching for stolen goods. With the growth of the inquisitorial procedure of the Star Chamber there grew up, however, a practice of allowing the secretary of state to issue general warrants for the search of libels. The power was expressly conferred by the licensing acts, but it survived their expiration. The issue on searches and seizures came to a head in the 1760s when John Wilkes and certain

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others were arrested for seditious libel. Out of these proceedings two important rules of law emerged. The first concerned the validity of general warrants, the second the validity of special warrants to search for and seize private papers.

The warrant under which Wilkes was arrested was issued by Lord Halifax, principal secretary of state under George III, ordering all "His Majesty's officers, civil and military, and loving subjects whom it may concern" to "make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper" and to bring them in "together with their papers" for examination. A search warrant could scarcely have been phrased in more inclusive terms. The question of its validity was not passed upon in the Wilkes habeas corpus proceeding which followed, nor was it clearly determined, although it was discussed both by counsel and the justices, in the damage suit of Dryden Leach against three of the King's Messengers. Shortly after these cases, however, the House of Commons by resolution declared all general warrants to be illegal "except in cases provided by act of Parliament."

James Otis' thundering condemnation in Boston in 1761 of the odious writs of assistance, "instruments of slavery on the one hand and villainy on the other," preceded by two years the arrest of Wilkes. The controversy over searches and seizures was therefore under way in the colonies before it came to a head in England. But writs of assistance for the apprehension of smugglers and the seizure of customable goods were expressly authorized by act of Parliament, whereas the warrants involved in the English cases were sanctioned neither by the common law nor by statute.

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The issue over writs of assistance was one of the flames that lighted the American Revolution. When therefore the state conventions that ratified the federal constitution in 1787-1788 clamored for amendments that would safeguard individual liberties against the government, it was natural that protection against unreasonable searches and seizures should have been thought of. Hence, the Fourth Amendment, which among others, was proposed by the First Congress in 1789 and ratified by the states two years later:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Closely related to this declaration both in point of fact and in judicial interpretation is the provision against self-incrimination in the Fifth Amendment:

"Unreasonable searches and seizures" is manifestly an elastic phrase, subject to no precise definition and therefore to considerable latitude in interpretation. The result is that American law upon this subject offers considerable diversity and tendency to vagary. Even where searches and seizures are admittedly illegal the problem of the best means of giving effect to the constitutional guaranty presents itself. The federal courts as well as the courts of more than a third of the states have held the view that the only sufficient means by which the protection can be truly realized is by a refusal on the part of the courts to receive at trial evidence that has been acquired by the

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government as a result of an unreasonable search and seizure. This they hold is the only safeguard that will restrain over-zealous government enforcing officers.

A majority of the state courts, however, take a different view. They hold that evidence of crime is evidence no matter how it has been secured and that the culprit should not go free because his constitutional rights have been abused. As it has been put by Justice Cardozo, the criminal should not go free "because the constable has blundered" (*People v. Defore,* 242 N. Y. 13.) The courts point out that the aggrieved citizen has other remedies against the offending officer. He may, for example, resist the officer who illegally invades his privacy or he may sue him for damages or prosecute him for oppression or ask that he be removed or otherwise disciplined by his superiors.

As was pointed out in the *Wolf* case, 338 U. S. 25, *supra,* the remedies by which the arbitrary conduct of the officers should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

The rule of decision in California is the common law of England as it stood in the year 1850 (*Martin v. Superior Court,* 176 Cal. 289). At common law the remedy against an unlawful search and seizure was an action of trespass. In England from the time of *Leach, Entick and Wilkes* [1763] (19 How. State Trials, 1002, 1030, 1154) to *Ellias v. Pasmore* (K. B. 1934, Vol. 2) this was considered sufficient. In 1763 Wilkes recovered from the

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King's Messenger 1,000 pounds—no mean sum then or now. In the *Ellias* case, K. B. 1934, Vol. 2, *supra*, Sir Stafford Cripps, K.C., recovered 40 pounds and costs on behalf of the members of the National Unemployed Workers.

In California, following the common law tradition, the citizen has secured to him the same protection for his right to immunity from unlawful searches and seizures. This remedy is not only theoretical—it is an actuality. In *Stern v. Superior Court*, 76 Cal. App. 2d 772, the District Court of Appeal ordered the trial court to return to Stern the sum of $6.000 taken from him as the result of an illegal search and seizure. *Silva v. MacAuley*, 135 Cal. App. 249, is authority for the proposition that an officer who acts in excess of his authority is liable to answer in damages and affirmed an award of $428 on account of the illegal seizure of crabs. Such liability extends not only to the officer immediately involved but to his principal and his bondsmen as well. (*Abbott v. Cooper*, 218 Cal. 425.)

Wirin v. Horrall, 85 Cal. App. 2d 497, is another example of adequate relief from illegal searches.

What was said in the *Wolf* case, 338 U. S. 25, *supra*, about the securing of the guarantees implicit in "the concept of ordered liberty" and "due process" was earlier stated by the United States Supreme Court in *Hebert v. Louisiana*, 272 U. S. 312 at 316:

> ". . . What it [due process] does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"

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The doctrine in *Wolf v. Colorado*, 338 U. S. 25, *supra*, has been lately reiterated in the case of *Stefanelli v. Minard*, 342 U. S. 117 at 120, as follows:

> "We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue. The special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment, see, *e. g.*, 28 U. S. C. §§1341, 1342, 2283, 2284(5). This concern has been reflected in decisions of this Court, not governed by explicit congressional requirement, bearing on a State's enforcement of its criminal law."

The difference between the remedy in the *Weeks* case, 232 U. S. 383, *supra*, and the remedy as provided by California and a majority of the states finds a basis in reason as well as in history.

Wilkes and Leach and Entick had no quarrel with the local peace officers. They were victims of a political persecution carried on by the central government.

Otis and the founding fathers thundered against the officers of the crown and not against the local colonial peace officers.

The Fourth and Fifth Amendments were aimed at the correction of abuses of authority by a strong central government fresh in the memory of those who participated in

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the activities of the bodies which ratified the new constitution and demanded the amendments.

The "patrolman on the beat" will never be a part of a "gestapo." The *Wolf* case, 338 U. S. 25, *supra*, recognizes this fact and points out that the local police are more amenable to local control and less likely to be the adjuncts of political and religious persecutions.

As Mr. Justice Jackson said in his dissenting opinion in *Brinegar v. United States*, 338 U. S. 160, 181:

> ". . . This inconsistency does not disturb me, for local excesses or invasions of liberty are more amenable to political correction, the Amendment was directed only against the new and centralized government, and any really dangerous threat to the general liberties of the people can come only from this source."

Another point remains to be considered. The objects introduced in evidence were gambling equipment.

The seizure in this case by the police was legal and within the following language of *Harris v. United States*, 331 U. S. 145, 154:

> "Furthermore, the objects sought for and those actually discovered were properly subject to seizure. This court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime. Clearly the checks and other means and instrumentalities of the crimes charged in the warrants

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toward which the search was directed as well as the draft cards which were in fact seized fall within that class of objects properly subject to seizure. Certainly this is not a case of search for or seizure of an individual's private papers, nor does it involve a prosecution based upon the expression of political or religious views in such papers."

B. The Due Process Clause of the Fourteenth Amendment Does Not Require the Exclusion of Evidence Obtained by Unreasonable Search and Seizure.

(1) IN A PROSECUTION IN A STATE COURT FOR A STATE OFFENSE, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE EXCLUSION OF EVIDENCE OBTAINED BY UNREASONABLE SEARCH AND SEIZURE.

The first eight amendments to the Constitution of the United States, known as the Bill of Rights, are not binding upon the states, but are restrictions only upon the Federal Government.

Barron v. Baltimore, 7 Pet. 242, 249-250;
Spies v. Illinois, 123 U. S. 131, 166;
Brown v. New Jersey, 175 U. S. 172, 174;
Twining v. New Jersey, 211 U. S. 78, 93;
Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 447;
Feldman v. United States, 322 U. S. 487, 490;
Adamson v. California, 332 U. S. 46;
Wolf v. Colorado, 338 U. S. 25, 26.

Adoption of the Fourteenth Amendment did not incorporate and make the first eight amendments to the United States Constitution operative in the states on the ground that the rights protected by those amendments are privi-

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leges and immunities of citizens of the United States or elements of the due process of law protected by that amendment.

Maxwell v. Dow, 176 U. S. 581, 587-602;
Twining v. New Jersey, 211 U. S. 78, 90;
Palko v. Connecticut, 302 U. S. 319, 323;
Wolf v. Colorado, 338 U. S. 25, 26.

Therefore, in a prosecution in a State Court for a state crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.

Wolf v. Colorado, 338 U. S. 25, 33.

(2) The Conduct of the Police Officers in Securing Evidence Here Did Not Make the Use of Such Evidence a Denial of Due Process of Law Guaranteed by the Fourteenth Amendment.

Federal cases cited by the appellant which state that evidence secured by unlawful search and seizure is inadmissible in federal courts (*Boyd v. United States,* 116 U. S. 616; *Byars v. United States,* 273 U. S. 28; *Trupiano v. United States,* 334 U. S. 699; *Gouled v. United States,* 255 U. S. 298; *United States v. Jeffers,* 342 U. S. 48; *Silverthorn Lumber Co. v. United States,* 251 U. S. 385; *District of Columbia v. Little,* 178 F. 2d 13; and *Neuslein v. District of Columbia,* 115 F. 2d 690) are inapplicable to the situation here, as the federal courts have, by judicial implication, ruled that evidence so secured is not admissible, although the Fourth Amendment does not specifically so require. The United States Supreme Court has consistently refused to hold that the basic right to protection against arbitrary intrusion by the police, pro-

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tected by the Fourteenth Amendment, demands the exclusion of relevant evidence in state courts merely because it was obtained by an unreasonable search and seizure.

Wolf v. Colorado, 338 U. S. 25, 29-33;
Schwartz v. Texas, 344 U. S. 199, 201.

Other cases cited by the petitioner also have no application here. *Feldman v. United States,* 322 U. S. 487, held that testimony which the defendant was compelled to give in a state proceeding could be used against him in a federal proceeding; *On Lee v. United States,* 343 U. S. 747, held that none of the defendant's rights were infringed by use against him of conversations which he had with an informer, which had been heard over a radio by an officer to whom they were transmitted by a transmitter on the informer's person; *Lisenba v. California,* 314 U. S. 219, held that while the use of coerced confessions was forbidden by the Fourteenth Amendment, the triers of fact had determined on conflicting evidence that the confession had not been coerced, and the Supreme Court would not say that the triers of fact were wrong; in *McNabb v. United States,* 318 U. S. 332, however, it was held that the coerced confession could not be used; *Goldman v. United States,* 316 U. S. 129, held that evidence secured by placing a listening device on the outside of the wall of the defendant's office was admissible, and its use not a violation of the principles of the Fourth Amendment; *Olmstead v. United States,* 277 U. S. 438, held that evidence secured by tapping telephone wires outside of the defendant's premises was admissible, as there had been no search or seizure within the Fourth Amendment; *Zap v. United States,* 328 U. S. 624, held that no unlawful search and seizure had been carried on; *Chambers v. Florida,* 309

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U. S. 227; *White v. Texas,* 310 U. S. 530, and *Ashcraft v. Tennessee,* 327 U. S. 274, all held that the confessions introduced into evidence were obtained by means proscribed by the Fourteenth Amendment, and convictions obtained by their use could not be sustained; in *Betts v. Brady,* 316 U. S. 455, the defendant was denied counsel, but it was held that under the particular facts none of his constitutional rights had been denied him; *Sorrells v. United States,* 287 U. S. 435, was concerned with entrapment of the defendant by a federal officer; *Nardone v. United States,* 302 U. S. 379, held that communications secured by wire tapping were inadmissible in evidence because of the provisions of 47 U. S. C. 605; and *Rochin v. California,* 342 U. S. 165, held that securing evidence from the defendant's body by means of a stomach pump violated the Fourteenth Amendment, as such proceedings did "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. . . . They are methods too close to the rack and the screw to permit of constitutional differentiation."

We have no entrapment, denial of counsel, or coerced confessions here. Listening to what is said in a person's house through a listening device is not in and of itself an unreasonable search and seizure, or conduct which shocks the conscience, as illustrated by the holdings in *Goldman v. United States,* 316 U. S. 129, *supra; On Lee v. United States,* 343 U. S. 747. Use of evidence secured by police officers when they enter a defendant's home illegally does not deprive the defendant by reason of the illegal entry alone of the due process of law. (*Wolf v. Colorado,* 338 U. S. 25, 33; *Stefanelli v. Minard,* 342 U. S. 117, 122.) Here we have an entry into the petitioner's

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house, the placing of a microphone therein, and the subsequent gathering of evidence by use of the microphone. This is no more than seizure of evidence after an illegal entry, and the use of such evidence has been held not to deprive the accused of any right of due process of law guaranteed by the Fourteenth Amendment.

Wolf v. Colorado, 338 U. S. 25, 33;
Stefanelli v. Minard, 342 U. S. 117, 122;
Schwartz v. Texas, 344 U. S. 199, 201.

The activities of the police in surreptitiously placing flourescent powder on the betting markers in the possession of one of the petitioner's codefendant did not invade any interest of the petitioner. He was not in any way affected by those activities. When the police, after his arrest, asked him to put his hands under the ultra-violet lamp, he did so voluntarily, and laughed while he did it. [Rep. Tr. pp. 414-416, 524, 525.] No physical or mental coercion or promises were used to persuade him to do it. He did not hesitate or demur. As the evidence that he had fluorescent powder on his hands, was secured by his voluntary act, the petitioner cannot complain of its use. The respondent submits that there is no similarity whatsoever between the activities of the police officers in securing evidence in the instant case, and those activities of police officers which have been held to infringe the rights guaranteed to an accused by the Fourteenth Amendment. They did nothing which can be said to offend a sense of justice. There was no coerced confession such as that condemned in cases such as *Chambers v. Florida,* 309 U. S. 227, *supra;* no fraud used in gaining evidence; and no brutal physical force used such as that condemned in *Rochin v. California,* 342 U. S. 165, *supra;* and no other

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means of securing evidence used which has yet been held to infringe the right to a fair trial guaranteed by the Fourteenth Amendment.

The respondent submits, therefore, that the petitioner here was accorded the due process of law secured to him by the Fourteenth Amendment.

C. The Search and Seizure at the Time of the Arrest Was Incident to a Valid Arrest and Was Therefore Not an Unreasonable Search and Seizure.

On November 5, 1951, Irvine voluntarily caused to be filed in the Office of the Collector of Internal Revenue at Los Angeles a "Special Tax Return and Application for Registry-Wagering." [People's Ex. 63.]

In the application he gave his name as "Patrick E. Irvine"; business address, none; residence address, "3916 E. Second Street, Long Beach, California." He designated himself as the owner of the business of receiving wagers with one employee namely, Morris Lippe. The period to be covered by the return was "November 1951 to June 30, 1952." He paid a tax of $33.34. He filed a subsequent return on January 2, 1952. [People's Ex. 64.]

On November 1, 1951, Morris Lippe filed a similar return in which he stated that he was engaged in the business of accepting wagers for and on behalf of Patrick E. Irvine. [People's Ex. 67.]

These returns were filed in accordance with the provisions of Sections 3285, 3291, etc., of Title 26, U. S. C.

These returns were to all intents and purposes public records in the office of the Collector of Internal Revenue and open to inspection by law enforcement agencies (Tit. 26, U. S. C., Secs. 3292 and 3275.)

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By filing these returns Irvine and his employee Lippe served notice on the law enforcement agencies that they intended to engage in the commission of a felony in Los Angeles County and in all likelihood at the premises 3916 E. Second Street, Long Beach.

With this information at hand the law enforcement agencies had reason to believe that sooner or later Irvine would commit acts which would violate Section 337a of the *Penal Code of California,* a felony, and that these acts would be committed in conjunction with his employee Lippe.

On two occasions officers observed Lippe drive to and enter the premises at 3916 E. Second Street, Long Beach, which they knew were occupied by Irvine.

They then arranged the installation of a microphone in the premises (no wires were tapped) and overhead Lippe and Irvine discussing horse racing and receiving and placing bets over the telephone.

On January 3 and 4, 1951, the officers observed a Mr. Curti enter Irvine's place of business. Curti was a known professional gambler. [People's Ex. 71.]

The officers then devised the plan which led to Irvine's arrest on January 5, 1951, and the subsequent search and seizure of the papers subsequently used in evidence.

In executing this operation the officers engaged in no physical force or coercion.

Up to this point the officers did not have positive evidence that a crime was being committed by Irvine.

The possession of the incriminating papers by Curti in his automobile did not constitute a violation of Section 337a of the Penal Code of California. But if these papers

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came into the possession of Irvine in the premises at 3916 E. Second Street, such facts would be a violation of the section.

The success or failure of the endeavors of the officers depended on their finding Irvine in a room with the betting registers. (*Penal Code,* Sec. 337a.)

The impossibility of getting an accurate description of the papers in Curti's car under the circumstances and at that hour of the evening, making an affidavit and securing a search warrant is obvious.

But the officers did have reason to believe that Irvine then had possession of betting registers in one of the rooms at 3916 E. Second Street.

We contend that the search and seizure complained of was a reasonable search and seizure for two reasons: (1) the entry was made for the purpose of arresting Irvine and (2) the seizure was an incident to the arrest of Irvine who the officers have reasonable cause to believe was committing a felony.

The facts on which our contentions are based appear in the record and have been narrated above.

A peace officer may make an arrest without a warrant when he has reasonable cause to believe that the person to be arrested has committed a felony. (*Penal Code,* Sec. 836.) The question of reasonable and probable cause must be measured by the facts presented to the officer at the time he required to act. (*People v. Hupp,* 61 Cal. App. 2d 447.)

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In endeavoring to make a lawful arrest a peace officer may break the door or window of the house in which the officers have reasonable grounds for believing the person sought to be arrested is located. (*Penal Code,* Sec. 844.)

Upon making an entry for the purpose of making a lawful arrest the officers may search the person arrested and any premises under his control.

If after making a lawful entry the officers observe a crime being committed in their presence they may arrest the perpetrator and search him and the premises under his control.

In the instant case the officers had reason to believe that Irvine had committed a felony and was in the premises. They had a right to break and enter in an endeavor to apprehend him. They did so and discovered him committing a felony in their presence. They arrested him, searched the premises and seized the contraband.

This was a reasonable search and seizure and not one in violation of the guaranty against *unreasonable* searches and seizures.

In a similar case, *Harris v. United States,* 331 U. S. 145, 150-152, the Supreme Court of the United States held:

> ". . . This Court has also pointed out that it is only *unreasonable* searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and cir-

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cumstances.' Go-Bart Importing Co. v. United States, 282 U. S. 344, 357 (1931).

"The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. *Search and seizure incident to lawful arrest* is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.

"The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in Agnello v. United States, *supra,* at 30, it was said: 'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.' It is equally clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contrasted to a business premises, is subjected to search.

"Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested. Petitioner was in exclusive possession of a four-room apartment. His control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested." (Emphasis added.)

Further citation of authority is unnecessary.

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V.

No Telephone Communications Were Intercepted Here, so There Is No Occasion to Consider the Case of Schwartz v. Texas, 344 U. S. 199.

The petitioner contends that evidence introduced in the instant case was secured by wire tapping; that the use of information secured by wire tapping for any purpose has been condemned by Congress (47 U. S. C. 605), and by California (Cal. Penal Code, Sec. 640); and that therefore the evidence secured by that method here was inadmissible. He asks this court to overrule the recent case of *Schwartz v. Texas,* 344 U. S. 199, and hold that the federal law requires exclusion of such evidence in state courts.

None of the evidence here was secured by wire tapping, and there is no evidence whatsoever that any telephones were tapped in the investigation of the crimes in which the petitioner was involved.

The evidence shows that there was nothing connected to the telephone instrument or lines in the petitioner's home, and that the equipment which was installed there was not capable of transmitting what was said by those telephoning to his house, unless the voice came out of the receiver so loud that it could be picked up by the microphone in the room. [Rep. Tr. pp. 50, 51.] Police Officer Hermansen, who testified to almost all of the conversations heard over the loudspeaker, testified that he had never heard both ends of any telephone conversation from the petitioner's home. [Rep. Tr. p. 272.] It did not appear that any other witness had heard both ends of any such conversation. The evidence shows only that the police heard, through the microphone installed in the petitioner's house

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on several occasions, a telephone ringing or being dialed, and then a voice talking. Listening to the words spoken into the telephone receiver, in such absence of a physical connection with the telephone wires, is not an interception of a wire communication within the meaning of 47 U. S. C., Section 605 (*Goldman v. United States,* 316 U. S. 129, 133-135), nor within the meaning of California Penal Code, Section 640. (*People v. Sica,* 112 Cal. App. 2d 574, 586.)

There is, therefore, no reason for this court to consider or reconsider the matters determined in the *Schwartz* case (344 U. S. 199), *supra.*

Conclusion.

"Due process" is a precious thing.

The day was and still is when it can be used as a defense for the innocent.

But of late it has too often been used as a subterfuge to delay the justice feared by the felon. Irvine has no defense to the charge of which he now stands convicted except "that the constable blundered."

Even if the precious guarantee was infringed this court cannot interfere in this case.

> ". . . It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court."
>
> *Stein v. New York,* 346 U. S. 156, 186.

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We feel that the final words of Mr. Justice Jackson in the *Stein* case are an appropriate conclusion to this brief.

> "We are not willing to discredit constitutional doctrines for protection of the innocent by making of them mere technical loopholes for the escape of the guilty."
>
> *Stein v. New York,* 346 U. S. 156, 196.

The judgments of the California Court should be affirmed.

Respectfully submitted,

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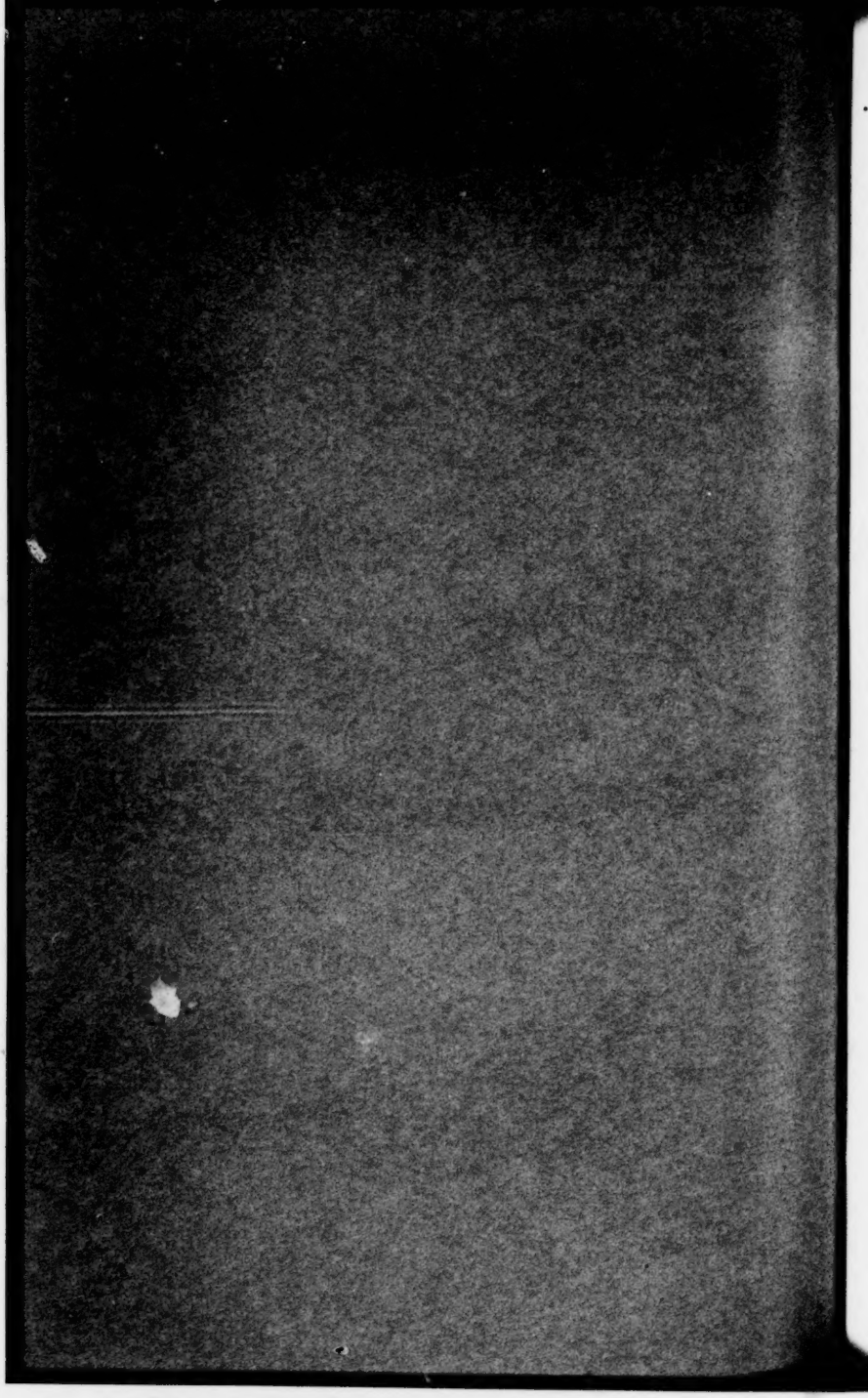

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APPENDIX.

UNITED STATES CONSTITUTION.

ARTICLE VI.

Section 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

. . .

AMENDMENT IV.

Section 1. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

Section 1. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

. . .

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AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

26 UNITED STATES CODE (Supp. V).

CHAPTER 27A—WAGERING TAXES (NEW).

§3285. Tax.

(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) Definitions. For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization ex-

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empt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(e) Exclusions from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

(f) Territorial extent. The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

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§3286. Credits and refunds.

(a) No overpayment of tax under this subchapter shall be credited or refunded (otherwise than under subsection (b)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Secretary, (1) that he has not collected (whether as a separate charge or otherwise) the amount of the tax from the person who placed the wager on which the tax was imposed, or (2) that he has repaid the amount of the tax to the person who placed such wager, or unless he files with the Secretary written consent of the person who placed such wager to the allowance of the credit or the making of the refund. In the case of any laid-off wager, no overpayment of tax under this subchapter shall be so credited or refunded to the person with whom such laid-off wager was placed unless he establishes, in accordance with regulations prescribed by the Secretary, that the provisions of the preceding sentence have been complied with both with respect to the person who placed the laid-off wager with him and with respect to the person who placed the original wager.

(b) Where any taxpayer lays off part or all of a wager with another person who is liable for tax under this subchapter on the amount so laid off, a credit against the tax imposed by this subchapter shall be allowed, or a refund shall be made to, the taxpayer laying off such amount. Such credit or refund shall be in an amount which bears the same ratio to the amount of tax which such taxpayer paid under this subchapter on the original wager as the amount so laid off bears to the amount of the original wager. Credit or refund under this subsection shall be allowed or made only in accordance with regulations prescribed by the Secretary; and no interest

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shall be allowed with respect to any amount so credited or refunded. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

§3287. Certain provisions made applicable.

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax imposed by this subchapter. In addition to all other records required pursuant to section 2709, each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

SUBCHAPTER B—OCCUPATIONAL TAX.

§3290. Tax.

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

§3291. Registration.

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

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(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

§3292. Certain provisions made applicable.

Sections 3271, 3273(a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

§3293. Posting.

Every person liable for special tax under this subchapter shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request; to any officer or employee of the Bureau of Internal Revenue. (Added Oct. 20, 1951, c. 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

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§3294. Penalties.

(a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

(b) Failure to post or exhibit stamp. Any person who, through negligence, fails to comply with section 3293, shall be liable to a penalty of $50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of $100, and the cost of prosecution.

(c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

SUBCHAPTER C—MISCELLANEOUS PROVISIONS.

§3297. Applicability of federal and state laws.

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

§3298. Inspection of books.

Notwithstanding section 3631, the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the

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enforcement of this chapter. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., c. 521, Title IV, §471(a), 65 Stat. 529.)

26 U. S. C. §3275. List of special taxpayers for public inspection.

(a) In collector's office. Each collector shall, under regulations of the Commissioner, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality, he shall furnish a certified copy thereof, as of a public record, for which a fee of $1 for each one hundred words or fraction thereof in the copy or copies so requested, may be charged.

26 U. S. C. §3276. Application of state laws.

The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.

47 U. S. C. §605. Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or

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publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: PROVIDED, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 9, 1934, c. 652, §605, 48 Stat. 1103.)

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California Constitution.

Article I.

Sec. 19. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized. (Constitution of 1849, Art. I, Sec. 19.)

California Penal Code.

Section 334. Witness' privilege. No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified. (Enacted 1872.)

Section 337a. . . . Every person,

1. Who engages in pool-selling or book-making, with or without writing, at any time or place; or

2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between

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men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

5. Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, inclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivisions 1, 2, 3 or 4, of this section; or

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6. Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus,

Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive.

Section 459. . . . Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code, vehicle as defined by said code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

Section 640. . . . Every person who, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently, or clandestinely taps, or makes any unauthorized connection with any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company; or who willfully and fraudulently, or clandestinely, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or com-

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munication while the same is in transit or passing over any telegraph or telephone wire, line, or cable, or is being sent from, or received at any place within the state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained; or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things hereinabove mentioned, is punishable as provided in section 639. . . .

CALIFORNIA PENAL CODE.

§836. Arrests by peace-officers: (Arrest under warrant or without warrant in certain cases authorized). A peace-officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

1. For a public offense committed or attempted in his presence.

2. When a person arrested has committed a felony, although not in his presence.

3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

5. At night, when there is reasonable cause to believe that he has committed a felony. (Enacted 1872.)

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CALIFORNIA PENAL CODE.

§844. (Door or window may be broken in making arrest, when.) To make an arrest, a private person, if the offense be a felony, and in all cases a peace-officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired. (Enacted 1872; Am. Code Amdts. 1873-74, p. 435.)

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FEB 23 195
HAROLD B. WILLEY,

No. 12

IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

PATRICK E. IRVINE,
Defendant and Appellant,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee.

PETITION FOR REHEARING

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Attorney for Defendant and Appellant.

WESTERN PRINTING COMPANY, WHITTIER

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BLEED THROUGH– POOR COPY

IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

PATRICK E. IRVINE, *Defendant and Appellant,* vs. PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Appellee.*	No. 12

PETITION FOR REHEARING

To The Honorable Earl G. Warren, Chief Justice of the Supreme Court of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

We respectfully pray for rehearing.

We urge errors both of fact and of law as grounds for our rehearing.

No case has shocked the legal or newspaper profession in the nation more than this one. The decision has received wide-spread comment, resulting in calls,

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newspaper comment and criticism of a very wide and earnest nature. We attach herewith as an appendix editorial comments regarding the same.

The American way of life is at stake. The example of this case, insignificant in its effect upon the defendant, will have world-wide repercussion as an example of American justice or injustice. Our boast of our home inviolability is demonstrated in reverse.

This counsel had the privilege of being attorney for Edwin W. Pauley after Mr. Pauley represented the United States Government in various trips abroad. One of these trips was made into Russia. Mr. Pauley described to this counsel how every room he was in had secret sound recording device. Mr. Pauley thought it was shocking. But, it is no more shocking than the liberty given by this court to our own police in its decision in this case. No better—or worse—case will ever come before this court. The court has described the actions of the police as "incredible, if it was not admitted." "Few police measures have come to our attention that more flagrantly, deliberately and persistently violated the fundamental principles declared by the Fourth Amendment as a restriction on the Federal Government," etc., says the majority opinion; yet the Court upholds this flagrant, deliberate and persistent violation of the fundamental principles by approving the use of the evidence obtained by this method.

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It says that a fair trial results even though obtained by foul methods.

In the field of sports, a "foul ball" does not count as a strike. Unfair tactics on the football field penalizes the team; an off-side play costs the team 15-yards, and thereby may cost the game. A punch below the belt, in the prize fight ring, costs the puncher the fight.

The Fourteenth Amendment has been described in various cases by this Court as the sporting man's idea of fair play in a trial. Is it fair play to use evidence tainted with illegality, secured in violation of the principles laid down by the Fourth Amendment which the founding fathers insisted be made a part of our Constitution, and which has a history of long and vigorous fighting on the part of the American people to secure its protection? California's Article I, Section 19, is in similar language.

The Fourth Amendment provides that:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The decision in *Wolf v. Colorado,* 338 U. S. 25, 27, for the first time established that "The security of one's privacy against arbitrary intrusion by the police"

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is embodied in the concept of due process found in the Fourteenth Amendment. The court, in its decision, has overlooked the basic principle established by that Constitutional Amendment.

California has a similar provision in Article I, Section 19, of the Constitution. With the exception of a few words altered, the identical provision is contained in that Amendment.

Therefore, the California provision in its Constitution must be construed identically with the construction of the Fourth Amendment to the Constitution of the United States.

In *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 694, Mr. Justice Roberts said:

> "Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just."

In *Brown v. Allen*, 344 U. S. at 475, this court said:

> "Therefore, it does not matter in this case whether or not the jury was acquainted with all the facts laid before the judge upon which petitioner now relies or whether the jury heard or did not hear the petitioner testify. Neither does it matter that there possibly is evidence in the record independent of the confessions which could sustain the verdict. The mere admission of the con-

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> fessions by the trial judge constituted a use of them by the state, and if the confessions were improperly obtained, such a use constitutes a denial of due process of law as guaranteed by the Fourteenth Amendment."

The same may be said *arguendo* regarding the use of confession illegally obtained by police brutality. They still go on and the lower courts, and even this court is restrained constantly to enforce the rule after its violation, both federally and state wise. But, it does not change the fact that the use of such evidence violates those fundamental principles of liberty and justice that are at the base of our institutions and for which we try to set an example.

Hebert v. Louisiana, 272 U. S. 312;
Strobel v. California, 343 U. S. 181, 96 L. Ed. 872;
Malinski v. New York, 324 U. S. 401, 89 L. Ed. 1029.

The court has now stated that though the methods are wrong if the result is right, it embodies the fundamental concept of due process of law.

But, when this court said that the "evidence tainted with illegality may be used in a courtroom" it defiles the temples of justice and does violate the basis American concept against unreasonable searches and seizures.

The fruit of the poisonous tree is used with judicial approval.

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The temple of justice is thus defiled.

This court has said in *Sorrells v. United States,* 287 U. S. 435, that the purity of the court belongs to the court. When the courts approve the use of such evidence, it cannot escape the charge that it is a part of the illegal machinery. To the extent, therefore, that *Wolf v. Colorado* fails to reject the poisonous fruit and says that a fair conviction can result from foul means, this Court should now rehear the case and overrule that doctrine.

Mr. Justice Clark, in his concurring opinion, stated that had he sat on the court when Wolf was decided, he would have gone the other way. We appeal to Mr. Justice Clark to vote for a rehearing in this case, and thus enable us again to consider whether the concept of the Fourth Amendment, basic in our American way of life, should become a basic doctrine for all of the states.

In the case of entrapment, where the acts would otherwise be a crime, but for the conduct of officers of the law, this court has said, in *Sorrells v. United States,* 287 U. S. 435, and in *Casey v. United States,* 273 U. S. that such conduct is against public policy; that public policy forbids holding a conviction based upon such conduct of officers of the law. But, here the evidence obtained is by methods far more contrary to the public policy of the American way of life.

(1) It was an entry into petitioner's home without a search warrant. (2) It was a burglary. (3) A key

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was made without his knowledge or consent. (4) A hole was drilled into his roof and a recording device was installed therein. (5) The device was installed without the consent or permission or provisions of the Penal Code of California, Section 653(f). (6) Recordings were taken for more than a month in a private bedroom of the petitioner. (7) He was ordered to exhibit his hands to an examination of an ultra-violet lamp after entry had been made into his house without any warrant.

When the court says in one breath that it was wrong to use these methods and yet it approves of the use of the evidence thus obtained, is it not like saying to a thief—you stole my money, but now that you have it it is all right to use it as you see fit.

Yet no court has ever allowed the thief to keep the property that he stole, even though he stood prosecution for it and was convicted of it.

The evidence in this case was stolen from the appellant. The entry, as the court has expressed it, was obtained through a burglary. The papers and the documents were the fruit of that burglarous entry. It is no answer for the courts to say that the officers engaged in the enterprise may now be prosecuted under the civil rights act for their misconduct in the case, when the court itself is willing to accept the fruits of their illegal enterprise, and if they should be prosecuted the argument would forcibly be made to the jury that they caught a criminal and that the Supreme Court

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approved the use of the evidence. So, what difference does it make how or what they did; a conviction under those circumstances would be well-nigh impossible. Nor does it get away from the basic question, far more fundamental. That basic question was presented by Mr. Chief Justice Hughes in *Mooney v. Holohan*, 294 U. S. 103, where this court held that perjured evidence, knowingly secured, through officers of the state, would be rejected and would form the basis of granting a writ of habeas corpus even twenty years after a conviction.

Many times this court has weighed the importance of rejecting improperly secured evidence as the basis for voiding a judgment. Thus, this court has repeatedly evidence obtained by an illegally secured confession as in violation of the concept of ordered liberty.

> *Chambers v. Florida*, 309 U. S. 227, 84 L. Ed. 814.

Where confessions are obtained without arraignment, it has been held that the procedural violation bars the use of the confession.

> *McNabb v. United States*, 318 U. S. 332, 87 L. Ed. 819.

Due process of law embodied in its concept is a fundamental fairness in every stage of the criminal procedure, and that fundamental fairness is denied when there has been a use of fraud, collusion, trickery and

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subordination of perjury on the part of the State prosecution.

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791;

Lisenba v. California, 314 U. S. 236, 86 L. Ed. 180.

A defendant induced to testify against himself by threats or promises in the presence of the court or jury.

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 814.

The use of evidence in violation of the Fourth Amendment to the Constitution of the United States.

Hague v. C. I. O.

By the use of evidence obtained by such lawless methods, has the appellant received a trial consonant with standards accepted by this nation as adequate to justify his conviction?

See

Hebert v. Louisiana, 272 U. S. 312, 71 L. Ed. 270;

Adamson v. California, 332 U. S. 46, 91 L. Ed. 1903.

The majority opinion makes a "practical" approach to its decision. It says:

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> "The extent to which the practice (of illegal search and seizure) was curtailed, if at all, is doubtful. The lower federal courts, and even this court, have repeatedly been constrained to enforce the rule after its violation."

The same may be said, *arguendo,* regarding the use of confessions illegally obtained by Police brutality. They still go on and the lower court, and even this court, is restrained constantly to enforce the rule after its violation, both federally and state wise. But,, it does not change the fact that the use of such evidence violates those fundamental principles of liberty and justice that are at the base of our institutions and for which we try to set an example.

Hebert v. Louisiana, 272 U. S. 312, 71 L. Ed. 270;

Strobel v. California, 343 U. S. 181, 96 L. Ed. 872;

Malinski v. New York, 324 U. S. 401, 89 L. Ed. 1029.

We respectfully submit that the use of evidence illegally obtained, as in this case, is repugnant to "that fundamental fairness essential to the very concept of justice."

Lisenba v. California, 314 U. S. 219, 86 L. Ed. 156.

It is like permitting a ball team to win its game on foul balls and to let the runners run and count the

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score even though the ball was a foul. In football, where a player has been off-side, even though another man reaches the goal with the ball, the players will be called back and the score will not be counted. Shall there be any less fairness in the game of life, when either life or liberty is at stake, shall this be the American standard? Can the purity of a judgment rest upon the impurity in the course of its procurement? Can evidence tainted with impurity—secured by housebreaking and invasion of privacy, give a pure judgment? We say, most respectfully, that it cannot.

We urge this court, once and for all, to rehear this matter and, once and for all, to disapprove court use anywhere in the United States of the use of stolen property secured by "methods that are incredible if they were not admitted."[1]

We therefore appeal to Justice Clark, in view of the language of his concurring opinion, to vote for a

[1]From a practical standpoint the rejection of evidence illegally secured has probably had a far greater effect in the federal courts and in those states where it is used than this court seems to envision. The F.B.I. and its school for officers gives lectures on the subject at great length; so, too, in the states where use of such evidence is forbidden, the officers are instructed not to use it; and few, if any, cases have come to the United States Supreme Court from those states, showing that it is more observed than breached therein and that its own courts enforce the rule. The trouble with trying to get legislation through to enforce the exclusion of such evidence in states is that peace officers of the various states have become organized and are politically active against any measures that will make them work more. As long as the courts will accept and not reject the evidence they feel secure in the lazy, illegal approach. In California, the counsel for this appellant has at two sessions of the Legislature proposed laws excluding the illegal evidence. A justice of the State Supreme Court has likewise proposed such legislation. Promptly, the representative of the law enforcement officers appeared at the Legislature to oppose such a measure. He has been joined by the Attorney General, who has representatives present at the Legislative session. The result was a prompt killing of the proposed measure outlawing the use of such evidence. If such evidence was excluded by a decision of the United States Supreme Court, it would be followed in the States.

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rehearing so that we may present further facts, figures and argument in respect to this matter.

Mr. Justice Clark says if he were in the Court when the *Wolf* case was before it, he would have voted the other way. Since there are four votes "the other way" in this case, his vote could not only grant a rehearing but properly present the law as he views it should be, and as we urge; it must be corrected to preserve our American ideals.

No longer is a man's house his castle in the United States. The police may break in at random; they may burglarize the place and make a key; they may listen to bedroom conversation and use the effect thereof with the approval of the highest court in the land.

Wolf v. Colorado says that:

> "The security of one's privacy against arbitrary intrusion by the police—where is at the core of the Fourth Amendment . . . "

is embodied in the concepts of due process found in the Fourteenth Amendment. Those are mere words if, in the next breath, the court says, that the privacy invaded by the arbitrary intrusion by the police won't make any difference because we will permit the court to receive the evidence that the police stole by invading this privacy.

Neither in morals nor ethics should the court allow this decision to stand. This court and the learned Jus-

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tice who wrote the majority opinion have not hesitated heretofore to reconsider prior decisions and to hold that they were in error. We think that it should do so with this case, and that a rehearing should be granted and the matter fully and fairly argued again on these fundamental principles, too sacred to American life to allow to stand as now uttered.

The court distinguishes this case from *Rochin v. California,* 342 U. S. 165. It says:

> "However obnoxious are the facts in the case before us, we do not involve coercion, violence or brutality to the person, but rather a trespass to property plus eavesdropping."

We do not understand the distinction which the court attempts to make between assault upon a man's person and that upon his property. The writs of assistance which were so odious to English speaking people and gave rise to the Fourth Amendment were assaults upon and seizure of property. The sacredness of the home is a sacredness of property rights, an invasion of man's castle is an invasion of his property.

In the *Rochin* case the evidence was illegally obtained. That necessarily had to be the basis of its decision. Whether the obtaining was by illegal search by physical assault or otherwise, its exclusion could only be on the basis that it was *illegally* obtained. The argument of the court seems to run that because in the *Rochin* case there was a physical assault upon his per-

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son that it made the evidence less competent to use than if officers ran a wire to the top of his house into his bedroom and listened to his private conversations for a month. Words spoken, things heard and recorded and played on a loud speaker, under such circumstances may be more hideous and obnoxious than a physical assault; but the essence of either is that the evidence was illegally obtained. Contrary to the principles of the Fourth Amendment, also Article I, Section 19 California Constitution. The means by which they were obtained make them no less illegal in either case. The prohibition of the Fourth Amendment forbids the use of evidence whether obtained by search of "the person or things to be seized." Similar language is contained in Article I, Section 19, of the Constitution of the State of California,[2] and we may add that the petitioner was compelled to exhibit his person to the examination of fluourescence, after the officer had entered his home without any search warrant or other legal process. To this extent there was coercion and physical force.

As we understood the *Wolf* case, Colorado, like most states in abortion cases, requires a corroboration of the woman witness. That corroboration required more than her testimony. The books taken from his office were in his own handwriting, having the name

[2]Article 1, §19. Searches and Seizures, restriction on.
The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the person and things to be seized.

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of the woman in it and the date of her appointment. This, of course, would be corroboration. He did not read that record as holding that it was used initially to secure the name and addresses of his patients to look up and interrogate them. We did not ask this court to distinguish this case from the *Wolf* case as between a "mild" shock and a more "severe" shock. We asked this court to make the rule of law universal, whatever the shock—as we believe the Constitution intended. This court has made a distinction between "physical force in obtaining the evidence" and "illegal search." We realize, as does this court, that there has been wavering of enforcement of the Fourth Amendment by the inclusion of illegally secured evidence, as announced in *Weeks v. United States,* 232 U. S. 383. This court should now end that waiver in enforcement of the protection of a constitutional right. There should be no wavering in its enforcement and the declination by this court to any use of the fruits of an illegal venture. This court, as the great teacher, should set the example. Law enforcement would be the better for it, as pointed out by the Wickersham Commission in 1936. We cannot promote respect for law when the very persons employed to enforce it set an example of *lawlessness* themselves, and when this court, the ideal of purity and wholesomeness, will accept the fruits of the illegal ventures and allow it to be used.

Mr. Justice Clark, in his concurring opinion, says:

> "In light of the 'incredible' activity of the police here it is with great reluctance that I follow

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> *Wolf*. Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction.' "

We know of no reason why a wrong decision should be followed, and we know of no greater or better time to convert the wrong decision and the wrong philosophy expressed thereby. If this court grants a rehearing and reversed this case, the effect of the *Wolf* decision will be extinguished. This Court, as a great teacher, must set the example. We appeal to Mr. Justice Clark to be the leader therein for other votes on the court that will agree with him.

The majority opinion says that our point two namely, that the state's use of compelled evidence compelled by the Federal Government was answered by *United States v. Kahriger,* 345 U. S. 22. We thought we distinguished the *Kahriger* case from our case by reason of two facts, (1) The *Kahriger* case was one merely an appeal based upon the statute itself wherein there was nothing before the court except that the defendant had secured a wagering stamp tax.

In the instant case, the Collector of Internal Reveenue not only furnished the stamp tax which the statute seems to authorize him to do, but also furnished all the reports made to the Bureau of Internal Revenue, which we had forwarded to the court as exhibits in this case. There is nothing in the statute, 65 Stats. 529, 26 U. S. C. (Supp. V) §3285 et seq. which provides

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that the Collector of Internal Revenues shall furnish to a State District Attorney the reports made to him on the tax. The statute says nothing as to whether these documents are or are not confidential; but, ordinarily, all tax returns to the Collector of Internal Revenue except those made public by the President or by regulations issued by the Secretary of the Treasury are confidential. It was these exhibits and documents from the Collector of Internal Revenues that furnished basic evidence upon which the appellant was convicted, for these are the documents in which a "confession" was contained that he had received money from wagering on horses and was paying a tax thereon.

The application for a stamp giving his home address and the date was no doubt a lead to the police, for which they installed the dictaphone and wired his house; but the documents that were of a convincing and convicting nature and happened subsequent to his application for a stamp was his payment of tax for the wagering and his declaration thereof under a statement that he might be prosecuted for under pains and penalty of perjury to the Bureau of Internal Revenue for the period in question.

This subject was not covered by the *Kahriger* case and is not covered in the court's footnote in this case. This court did not hold these subsequent reports and documents to the Internal Revenue "constitutional" in *United States v. Kahriger*. The extent of the statute is that it makes the requirement of purchasing a

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stamp, giving the home address and date to be made public, but says nothing about the other reports which were used. In the absence of such a statement in the statute, under the rule of *inclusio unius exclusio alterius* the matters not included are excluded and come within the general prohibition of the Internal Revenue Code that these other matters are confidential.

But, this court did not in *United States v. Kahriger* consider the further claim which we assert, that not even Congress can make "compelled evidence constitutional." This court, in *Boyd v. United States,* 116 U. S. 616, held that "not even Congress could pass an act which would compel the production of documents or evidence and that such a statute passed by the Congress would be held to be unconstitutional." (See *Boyd v. U. S.,* 116 U. S. 616). Such evidence compelled by the government ought not to be permitted to be used in support of a conviction.

Also for the reasons set forth in the able dissenting opinions of Mr. Justices Black and Douglas, concurring on the question of *extorted* confessions by the Federal Government, we urge a rehearing, and also we urge a rehearing for the reasons set forth in the able dissenting opinions of Mr. Justice Frankfurter with Mr. Justice Burton joining, for each of the reasons set forth therein.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

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CERTIFICATE OF COUNSEL

MORRIS LAVINE, counsel for the appellant, hereby certifies that he has filed the foregoing Petition for Rehearing in good faith and not for the purposes of delay, and that the same is based upon matters occurring since the filing of the Petition for Certiorari, and upon matters that are in the opinion rendered by this Court February 8, 1954, and no others.

.....

Morris Lavine

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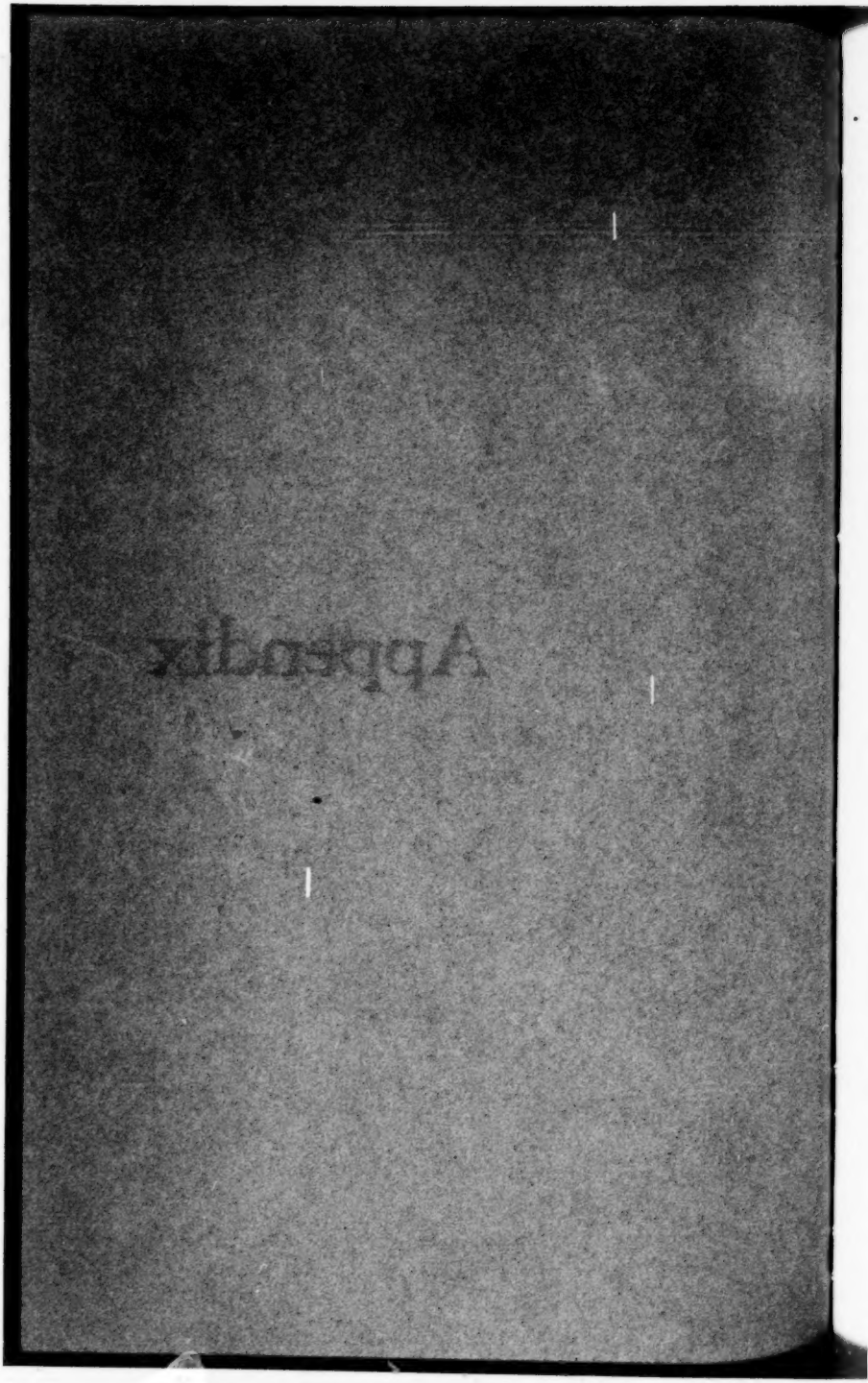

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APPENDIX A

ST. LOUIS POST-DISPATCH, TUESDAY, FEBRUARY 9, 1954

Reprinted from
ST. LOUIS POST-DISPATCH,
Tuesday, February 9, 1954

ST. LOUIS POST-DISPATCH
Founded by JOSEPH PULITZER
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A Judicial Outrage

A terribly wrong decision has just come from the "new" Supreme Court in a case involving one of the most basic of liberties—the right of the citizen to be secure in his own home against "unreasonable searches and seizures."

There are a shocking number of things wrong with this 5-to-4 decision, but undoubtedly the most distressing aspect of it is the fact that Chief Justice Warren is on the side that shuts its eyes to justice under the Constitution. Indeed it is by the vote of the new Chief Justice that the scales tip against the civil rights views of Justices Black, Douglas, Frankfurter and Burton and in favor of the strange position of Justices Reed, Jackson, Clark and Minton.

By this closest of divisions Chief Justice Warren and four of his colleagues refuse to overturn a state conviction based on evidence obtained under circumstances so revolting that they would reject the same evidence and conviction in a federal case. Indeed the trampling of constitutional rights is so offensive that Chief Justice Warren joins Justice Jackson, who wrote the majority opinion, in recommending that the record of the case be sent to the United States Attorney General. Their obvious intent is to suggest that the Department of Justice ought to investigate the possibility of indicting and prosecuting state officers who have so little regard for the Bill of Rights.

Chief Justice Warren and Justice Jackson base this extraordinary proposal on the fact that federal laws and the Federal Constitution make it a crime for state officials to deprive a citizen of rights secured to him by the Fourteenth Amendment, including the right to be secure against unreasonable search.

If the Fourteenth Amendment is to be used to punish officers for gathering illegal evidence, then the same Amendment should be used to void a conviction illegally obtained. How can the Amendment apply to those who commit a wrong and not apply to the wrong committed?

* * *

The case is a basic test under the Bill of Rights raised by Patrick E. Irvine of Long Beach, Calif., after invasions of his premises that would be little if any worse under police state rule in Communist satellites.

Now it happens that Patrick Irvine was a horse-race bookmaker. As a gambler he purchased a $50 federal gambling tax stamp. By looking at the list of federal gambling stamp purchasers, the police in Long Beach knew that much, but not enough for prosecution.

To make a California case, the Long Beach police sent a locksmith to the Irvine home in his absence (Dec. 1, 1951) to devise a key. With this key the police entered the house and installed a microphone. Then they strung wires to the microphone from a garage through a hole which they bored in the roof. They listened in by means of receivers in the garage.

Not satisfied with the results, the police entered the house again and shifted the microphone to the bedroom. Three weeks later they moved it to a closet. There the device

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stayed until it had "served its purpose," and thus led to Patrick Irvine's conviction under state law. At no time was a search warrant used.

• • •

We do not in the slightest approve the defendant's illegal business. Had he been tracked down and prosecuted fairly, he would have nothing to complain against. But he was not apprehended fairly. He was not convicted fairly. The outrage that can be visited on this miserable gambler can overtake any other citizen.

Next to Chief Justice Warren's dismaying enlistment in the camp of the Mintons and Reeds, the worst aspect of the decision is the astonishing position of Justice Clark. This former Attorney General says he thinks the Supreme Court made a mistake when, in 1949, it decided the case of Wolf vs. Colorado, the precedent on which the Irvine vs. California judgment is based. Justice Clark says he would have voted against the Wolf decision had he been on the Supreme Court at that time. But now he says he feels obligated to follow its mistaken rule.

Justice Clark is not obligated to follow any decision he does not believe in. Can it be that he is so little familiar with the history of the bench on which he sits that he does not know that Justices and the court have reversed themselves many times when convinced of error?

What has been approved in this case is, as Justice Douglas said, as revolting as the odious Writs of Assistance against which the great patriot James Otis cried out in colonial times. Once again the Supreme Court has joined in eroding the liberties of the American people.

• • •

This case should be reheard at the present term. Chief Justice Warren should have a chance to reverse himself promptly. Justice Clark should have an opportunity to straighten himself out. The Supreme Court should wipe this judicial outrage from its record before its already great damage is vastly magnified by lawless police in cities and towns throughout the country.

A judgment so rank will not stand for long. The quicker it is expunged the better it will be!

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APPENDIX B

Tuesday, February 9, 1954 S Los Angeles Herald & Express

SCOTT BLASTS IRVINE RULING

Attorney Joseph Scott today hit at the "creeping philosophy which is gnawing at the constitutional rights of the private citizen."

In a Lincoln Day address before the American Legion Luncheon Club, Scott referred to the bizarre decision of the Warren-headed United States Supreme Court that upheld by a 5 to 4 vote the bookmaking conviction of Patrick E. Irvine of Long Beach—yet lashed the "search and seizure" methods of the Long Beach police.

"All of the literature and hair-splitting phrases used do not eliminate the bald naked fact that the police invaded the home and placed a microphone therein, so that they could hear every word said in the Irvine household for more than a month," Scott said.

"While one of the members of the Supreme Court said, 'a sturdy self-respecting Democratic community should not put up with lawless police and prosecutors,' nevertheless the accused stands convicted and condemned notwithstanding the crude breach of his constitutional rights," he continued.

"It may be well to remind you earnest patriotic men of the Legion," Scott said, "to go further back than today's dictum to the solemn philosophy of the founding fathers that this is a government of laws and not of men."

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SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1953.

Patrick E. Irvine, Petitioner, *v.* People of the State of California.	On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

[February 8, 1954.]

Mr. Justice Jackson announced the judgment of the Court and an opinion in which The Chief Justice, Mr. Justice Reed and Mr. Justice Minton join.

This case involves constitutional questions growing out of methods employed to convict petitioner on charges of horse-race bookmaking and related offenses [1] against the antigambling laws of California.[2] Petitioner exhausted all avenues to relief under state procedures and then sought review here of duly raised federal issues.

We granted certiorari [3] on a petition which tendered four questions. However, petitioner's counsel has now presented two additional questions, one concerning the application of an immunity statute of California and another attacking certain instructions given to the jury by the trial court. Neither of these was mentioned in the petition. We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition unless we limit the grant, as frequently we do to avoid settled, frivolous

[1] Keeping premises with paraphernalia for the purpose of recording and registering bets on horse racing; receiving money and the equivalent thereof which had been or was to be wagered on horse races, and recording and registering bets on horse races.

[2] Deering's Cal. Penal Code Ann., 1949, §§ 337a (1), (2), (3), and (4).

[3] 345 U. S. 903.

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or state law questions. We do not take up the questions numbered 3 and 6 of petitioner's brief because they are improperly presented.

Upon his arrest, petitioner had on his person a federal wagering tax stamp bearing his name, home address and the date, November 5, 1951. Against objection, it and other documentary evidence from the office of the United States Collector of Internal Revenue was received to show petitioner's application for the wagering tax stamp and his return to the Collector under the federal law. These documents were made pursuant to the Federal Act imposing wagering taxes, 65 Stat. 529, 26 U. S. C. (Supp. V) § 3285 *et seq.*, held constitutional by this Court in *United States* v. *Kahriger*, 345 U. S. 22. The claim is made that it was error as a matter of federal law to admit this evidence and also that payment of the federal tax resulted in a federal license to conduct the wagering business. This statute does not make such records or stamps confidential or privileged but, on the contrary, expressly requires the name and place of business of each such taxpayer to be made public. 53 Stat. 395, 26 U. S. C. § 3275. Petitioner's contentions are without substance or merit in view of the express provision of the statute that payment of the tax does not exempt any person from penalty or punishment by state law and does not authorize commencement or continuance of such business. 53 Stat. 395, 26 U. S. C. § 3276; 65 Stat. 531, 26 U. S. C. (Supp. V) § 3292.[4]

But the questions raised by the officers' conduct while investigating this case are serious. The police strongly suspected petitioner of illegal bookmaking but were without proof of it. On December 1, 1951, while Irvine and his wife were absent from their home, an officer ar-

[4] Petitioner's question number 2, which challenges the State's use of "compelled evidence" obtained under the federal wagering statute, is answered in *United States* v. *Kahriger*, *supra*, at 32.

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ranged to have a locksmith go there and make a door key. Two days later, again in the absence of occupants, officers and a technician made entry into the home by the use of this key and installed a concealed microphone in the hall. A hole was bored in the roof of the house and wires were strung to transmit to a neighboring garage whatever sounds the microphone might pick up. Officers were posted in the garage to listen. On December 8, police again made surreptitious entry and moved the microphone, this time hiding it in the bedroom. Twenty days later they again entered and placed the microphone in a closet, where the device remained until its purpose of enabling the officers to overhear incriminating statements was accomplished.

We should note that this is not a conventional instance of "wire tapping." Here the apparatus of the officers was not in any way connected with the telephone facilities, there was no interference with the communications system, there was no interception of any message. All that was heard through the microphone was what an eavesdropper, hidden in the hall, the bedroom, or the closet, might have heard. We do not suppose it is illegal to testify to what another person is heard to say merely because he is saying it into a telephone. We cannot sustain the contention that the conduct or reception of the evidence violated the Federal Communications Act. 48 Stat. 1103, 47 U. S. C. § 605. Cf. *Nardone* v. *United States,* 308 U. S. 338; *Goldman* v. *United States,* 316 U. S. 129; *Schwartz* v. *Texas,* 344 U. S. 199.

At the trial, officers were allowed to testify to conversations heard through their listening installations. The snatches of conversation which the prosecution thought useful were received in evidence. They were in the lingo of the race track and need not be recited, but the jury might well have regarded them as incriminating. The testimony was received under objection, properly

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raising the question that it was constitutionally inadmissible since obtained by methods which violate the Fourteenth Amendment.

Each of these repeated entries of petitioner's home without a search warrant or other process was a trespass, and probably a burglary, for which any unofficial person should be, and probably would be, severely punished. Science has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busy-body. That officers of the law will break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The decision in *Wolf* v. *Colorado*, 338 U. S. 25, 27, for the first time established that "[t]he security of one's privacy against arbitrary intrusion by the police" is embodied in the concept of due process found in the Fourteenth Amendment.

But *Wolf*, for reasons set forth therein, declined to make the subsidiary procedural and evidentiary doctrines developed by the federal courts limitations on the states. On the contrary, it declared, "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

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338 U. S. 25, 33. See *Stefanelli* v. *Minard*, 342 U. S. 117, 119, 122. That holding would seem to control here.

An effort is made, however, to bring this case under the sway of *Rochin* v. *California*, 342 U. S. 165. That case involved, among other things, an illegal search of the defendant's person. But it also presented an element totally lacking here—coercion (as the Court noted, p. 173), applied by a physical assault upon his person to compel submission to the use of a stomach pump. This was the feature which led to a result in *Rochin* contrary to that in *Wolf*. Although *Rochin* raised the search-and-seizure question, this Court studiously avoided it and never once mentioned the *Wolf* case. Obviously, it thought that illegal search and seizure alone did not call for reversal. However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping.

It is suggested, however, that although we affirmed the conviction in *Wolf*, we should reverse here because this invasion of privacy is more shocking, more offensive, than the one involved there. The opinions in *Wolf* were written entirely in the abstract and did not disclose the details of the constitutional violation. Actually, the search was offensive to the law in the same respect, if not the same degree, as here. A deputy sheriff and others went to a doctor's office without a warrant and seized his appointment book, searched through it to learn the names of all his patients, looked up and interrogated certain of them, and filed an information against the doctor on the information that the District Attorney had obtained from the books. The books also were introduced in evidence against the doctor at his trial.

We are urged to make inroads upon *Wolf* by holding that it applies only to searches and seizures which pro-

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duce on our minds a mild shock, while if the shock is more serious, the states must exclude the evidence or we will reverse the conviction. We think that the *Wolf* decision should not be overruled, for the reasons so persuasively stated therein. We think, too, that a distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional ground.

Even as to the substantive rule governing federal searches in violation of the Fourth Amendment, both the Court and individual Justices have wavered considerably. Compare *Harris* v. *United States*, 331 U. S. 145; *Trupiano* v. *United States*, 334 U. S. 699; *United States* v. *Rabinowitz*, 339 U. S. 56; *Brinegar* v. *United States*, 338 U. S. 160; *Goldman* v. *United States*, 316 U. S. 129; *On Lee* v. *United States*, 343 U. S. 747. Never until June of 1949 did this Court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment. At that time, as we pointed out, thirty-one states were not following the federal rule excluding illegally obtained evidence, while sixteen were in agreement with it. Now that the *Wolf* doctrine is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power. The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere to *Wolf* as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions.

Whether to exclude illegally obtained evidence in federal trials is left largely to our discretion, for admissibility of evidence is governed "by the principles of the common

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law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. Rules Crim. Proc., 26. As we have pointed out, reason has led state courts to differing conclusions, but about two-thirds of them to acceptance of the illegally obtained evidence. What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure by federal officers. The rule was announced in 1914 in *Weeks* v. *United States*, 232 U. S. 383. The extent to which the practice was curtailed, if at all, is doubtful. The lower federal courts, and even this Court,[5] have repeatedly been constrained to enforce the rule after its violation. There is no reliable evidence known to us that inhabitants of those states which exclude

[5] *E. g., Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Gouled* v. *United States*, 255 U. S. 298; *Amos* v. *United States*, 255 U. S. 313; *Agnello* v. *United States*, 269 U. S. 20; *Byars* v. *United States*, 273 U. S. 28; *Gambino* v. *United States*, 275 U. S. 310; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452; *Taylor* v. *United States*, 286 U. S. 1; *Grau* v. *United States*, 287 U. S. 124; *Nathanson* v. *United States*, 290 U. S. 41; *United States* v. *Di Re*, 332 U. S. 581; *Johnson* v. *United States*, 333 U. S. 10; *Trupiano* v. *United States*, 334 U. S. 699; *McDonald* v. *United States*, 335 U. S. 451; *Lustig* v. *United States*, 338 U. S. 74; *United States* v. *Jeffers*, 342 U. S. 48. The Court has also cited the doctrine with approval in many related cases. *E. g., Perlman* v. *United States*, 247 U. S. 7; *Burdeau* v. *McDowell*, 256 U. S. 465; *Carroll* v. *United States*, 267 U. S. 132; *McGuire* v. *United States*, 273 U. S. 95; *Marron* v. *United States*, 275 U. S. 192; *Olmstead* v. *United States*, 277 U. S. 438; *Palko* v. *Connecticut*, 302 U. S. 319; *Goldstein* v. *United States*, 316 U. S. 114; *McNabb* v. *United States*, 318 U. S. 332; *Feldman* v. *United States*, 322 U. S. 487; *Davis* v. *United States*, 328 U. S. 582; *Zap* v. *United States*, 328 U. S. 624; *Harris* v. *United States*, 331 U. S. 145; *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793; *United States* v. *Rabinowitz*, 339 U. S. 56; *On Lee* v. *United States*, 343 U. S. 747. See Appendix to concurring opinion of MR. JUSTICE FRANKFURTER in *Harris* v. *United States, supra*, at 175.

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the evidence suffer less from lawless searches and seizures than those of states that admit it. Even this Court has not seen fit to exclude illegally seized evidence in federal cases unless a federal officer perpretrated the wrong. Private detectives may use methods to obtain evidence not open to officers of the law. *Burdeau* v. *McDowell*, 256 U. S. 465; see *McGuire* v. *United States*, 273 U. S. 95, 99; cf. *Feldman* v. *United States*, 322 U. S. 487; *Lustig* v. *United States*, 338 U. S. 74. And the lower federal courts, treating the Fourth Amendment right as personal to the one asserting it, have held that he who objects must claim some proprietary or possessory interest in that which was unlawfully searched or seized. *E. g., Connolly* v. *Medalie*, 58 F. 2d 629; *Steeber* v. *United States*, 198 F. 2d 615, 617. See *Goldstein* v. *United States*, 316 U. S. 114, 121; *Wolf* v. *Colorado*, *supra*, at 30–31. Cf. *United States* v. *Jeffers*, 342 U. S. 48.

It must be remembered that petitioner is not invoking the Constitution to prevent or punish a violation of his federal right recognized in *Wolf* or to recover reparations for the violation. He is invoking it only to set aside his own conviction of crime. That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police. The case is made, so far as the police are concerned, when they announce that they have arrested their man. Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a

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mild deterrent at best. Some discretion is still left to the states in criminal cases, for which they are largely responsible, and we think it is for them to determine which rule best serves them.

But admission of the evidence does not exonerate the officers and their aides if they have violated defendant's constitutional rights. It was pointed out in *Wolf* v. *Colorado, supra,* that other remedies are available for official lawlessness, although too often those remedies are of no practical avail. The difficulty with them is in part due to the failure of interested parties to inform of the offense. No matter what an illegal raid turns up, police are unlikely to inform on themselves or each other. If it turns up nothing incriminating, the innocent victim usually does not care to take steps which will air the fact that he has been under suspicion. And the prospect that the guilty may capitalize on the official wrongdoing in his defense, or to obtain reversal from a higher court, removes any motive he might have to inform.

It appears to the writer, in which view he is supported by THE CHIEF JUSTICE, that there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting a justifiable conviction of this common gambler. If the officials have willfully deprived a citizen of the United States of a right or privilege secured to him by the Fourteenth Amendment, that being the right to be secure in his home against unreasonable searches, as defined in *Wolf* v. *Colorado, supra,* their conduct may constitute a federal crime under 62 Stat. 696, 18 U. S. C. (Supp. III) § 242. This section provides that whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any state to the deprivation of any rights, privileges or immunities secured or protected by the Constitution of the United States shall be fined or imprisoned. See *Williams* v. *United States,* 341 U. S. 97; *Screws* v. *United States,* 325

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U. S. 91. It does not appear that the statute of limitations yet bars prosecutions. 45 Stat. 51, 18 U. S. C. § 582. We believe the Clerk of this Court should be directed to forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States. However, MR. JUSTICE REED and MR. JUSTICE MINTON do not join in this paragraph.

Judgment affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1953.

Patrick E. Irvine, Petitioner, *v.* People of the State of California.	On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

[February 8, 1954.]

Mr. Justice Clark, concurring.

Had I been here in 1949 when *Wolf* was decided I would have applied the doctrine of *Weeks* v. *United States*, 232 U. S. 383 (1914), to the states. But the Court refused to do so then, and it still refuses today. Thus *Wolf* remains the law and, as such, is entitled to the respect of this Court's membership.

Of course, we could sterilize the rule announced in *Wolf* by adopting a case-by-case approach to due process in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action a conviction is overturned and a guilty man may go free. *Rochin* bears witness to this. We may thus vindicate the abstract principle of due process, but we do not shape the conduct of local police one whit; unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of those police and prosecutors who may be intent on racking up a high percentage of successful prosecu-

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tions. I do not believe that the extension of such a vacillating course beyond the clear cases of physical coercion and brutality, such as *Rochin*, would serve a useful purpose.

In light of the "incredible" activity of the police here it is with great reluctance that I follow *Wolf*. Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction. Thus I merely concur in the judgment of affirmance.

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SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1953.

Patrick E. Irvine, Petitioner, *v.* People of the State of California.	On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

[February 8, 1954.]

Mr. Justice Black, with whom Mr. Justice Douglas concurs, dissenting.

I would reverse this conviction because the petitioner Irvine was found guilty of a crime and sentenced to prison on evidence extorted from him by the Federal Government in violation of the Fifth Amendment.

Federal law makes it a crime punishable by fine, imprisonment, or both, for a person to run a gambling business without making a report to the Government and buying a federal wagering tax stamp, both of which reveal his gambling operations.[1] Petitioner made the necessary report of his gambling activities in California and bought the required tax stamp. The information he gave and the stamp he bought were used in this case to convict and sentence him to prison for violating California's antigambling law. For reasons given in my dissent in *United States* v. *Kahriger,* 345 U. S. 22, 36, I believe the federal law that extracted the disclosures and required the tax stamp violates the Fifth Amendment's command that a person shall not be compelled to be a witness against himself. But even though the law is valid, as the Court held, *use* of such forced confessions to convict the confessors still amounts to compelling a person to testify against himself in violation of the Fifth Amendment.

[1] 65 Stat. 529, 26 U. S. C. (Supp. V) §§ 3285, 3287.

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I cannot agree that the Amendment's guarantee against self-incrimination testimony can be spirited away by the ingenious contrivance of using federally extorted confessions to convict of state crimes and vice versa.[2] Licensing such easy evasion of the Amendment has proven a heavy drain on its vitality although no such debilitating interpretation was given the Amendment by this Court until it decided *United States* v. *Murdock* in 1931, one hundred and forty years after the Bill of Rights was adopted.[3] That construction was rested on the premise that a state and the United States are so separate and foreign to one another that neither of them need protect witnesses against being forced to admit offenses against the laws of the other.[4] This treatment of the states and the Federal Government as though they were entirely foreign to each other is wholly conceptualistic and cannot justify such a narrow interpretation of the Fifth Amendment's language and the resulting frustration of its purpose.

I think the Fifth Amendment of itself forbids all federal agents, legislative, executive and judicial, to force a person to confess a crime; forbids the use of such a federally coerced confession in any court, state or federal; and forbids all federal courts to use a confession which a person has been compelled to make against his will.

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[2] See my dissent in *Feldman* v. *United States*, 322 U. S. 487, 494.

[3] 284 U. S. 141, and see *United States* v. *The Saline Bank of Virginia*, 1 Pet. 100; *Brown* v. *Walker*, 161 U. S. 591, 606, 608; *Ballmann* v. *Fagin*, 200 U. S. 186; *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103; *United States* v. *Murdock*, 290 U. S. 389, 396.

[4] Reliance for this view was placed mainly on two English cases, *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1050, and *Queen* v. *Boyes*, 1 B. & S. 311. 284 U. S., at 149. See discussion of these two cases as related to the Fifth Amendment privilege against self-incrimination in Grant, Immunity from Compulsory Self-Incrimination, 9 Temp. L. Q. 57–70 and 194–212, particularly 59–62 and 196–204.

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The Fifth Amendment forbids the Federal Government and the agents through which it acts—courts, grand juries, prosecutors, marshals or other officers—to use physical torture, psychological pressure, threats of fines, imprisonment or prosecution, or other governmental pressure to force a person to testify against himself. And if the Federal Government does extract incriminating testimony, as the Court has held it may in compelling gamblers to confess, the immunity provided by the Amendment should at the very least prevent the use of such testimony in any court, federal or state.[5] The use of such testimony is barred, even though the Fifth Amendment may not of itself prohibit the states or their agents from extorting incriminating testimony.[6] The Amendment does plainly prohibit all federal agencies from using their power to force self-incriminatory statements. Consequently, since the Amendment is the supreme law of the land and is binding on all American judges, the use of federally coerced testimony to convict a person of crime in any court, state or federal, is forbidden.

The Fifth Amendment not only forbids agents of the *Federal Government* to compel a person to be a witness against himself; it forbids federal courts to convict persons on their own forced testimony, whatever "sovereign"—federal or state—may have compelled it. Otherwise, the constitutional mandate against self-incrimination is an illusory safeguard that collapses whenever a confession is extorted by anyone other than the Federal Government.

Though not essential to disposition of this case, it seems appropriate to add that I think the Fourteenth Amendment makes the Fifth Amendment applicable to states and that state courts like federal courts are therefore

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[5] *Counselman* v. *Hitchcock*, 142 U. S. 547.

[6] See *Barron* v. *Baltimore*, 7 Pet. 243.

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barred from convicting a person for crime on testimony which either state or federal officers have compelled him to give against himself.[7] The construction I give to the Fifth and Fourteenth Amendment makes it possible for me to adhere to what we said in *Ashcraft* v. *Tennessee*, 322 U. S. 143, 155, that "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession."

So far as this case is concerned it is enough for me that Irvine was convicted in a state court on a confession coerced by the Federal Government. I believe this frustrates a basic purpose of the Fifth Amendment—to free Americans from fear that federal power could be used to compel them to confess conduct or beliefs in order to take away their life, liberty or property. For this reason I would reverse Irvine's conviction.

It has been suggested that the Court should call on the Attorney General to investigate this record in order to start criminal prosecutions against certain California officers. I would strongly object to any such action by this Court. It is inconsistent with my own view of the judicial function in our government. Prosecution, or anything approaching it, should, I think, be left to government officers whose duty that is.

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[7] *Adamson* v. *California*, 332 U. S. 46, 68 (dissenting opinion); *Rochin* v. *California*, 342 U. S. 165, 174 (concurring opinion).

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SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1953.

Patrick E. Irvine, Petitioner, *v.* People of the State of California.	On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

[February 8, 1954.]

Mr. Justice Frankfurter, whom Mr. Justice Burton joins, dissenting.

Mere failure to have an appropriate warrant for arrest or search, without aggravating circumstances of misconduct in obtaining evidence, invalidates a federal conviction helped by such an unreasonable search and seizure. Such was the construction placed upon the Fourth Amendment by *Weeks* v. *United States*, 232 U. S. 383. But *Wolf* v. *Colorado*, 338 U. S. 25, held that the rule of the *Weeks* case was not to be deemed part of the Due Process Clause of the Fourteenth Amendment and hence was not binding upon the States. Still more recently, however, in *Rochin* v. *California*, 342 U. S. 165, the Court held that "stomach pumping" to obtain morphine capsules, later used as evidence in a trial, was offensive to prevailing notions of fairness in the conduct of a prosecution and therefore invalidated a resulting conviction as contrary to the Due Process Clause.

The comprehending principle of these two cases is at the heart of "due process." The judicial enforcement of the Due Process Clause is the very antithesis of a Procrustean rule. In its first full-dress discussion of the Due Process Clause of the Fourteenth Amendment, the Court defined the nature of the problem as a "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on

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which such decisions may be founded." *Davidson* v. *New Orleans*, 96 U. S. 97, 104. The series of cases whereby, in the light of this attitude, the scope of the Due Process Clause has been unfolded is the most striking, because the liveliest, manifestation of the wide and deep areas of law in which adjudication "depends upon differences of degree. The whole law does so as soon as it is civilized." Holmes, J., concurring in *LeRoy Fibre Co.* v. *Chicago, M. & St. P. R. Co.*, 232 U. S. 340, 354. It is especially true of the concept of due process that between the differences of degree which that inherently undefinable concept entails "and the simple universality of the rules in the Twelve Tables or the Leges Barbarorum, there lies the culture of two thousand years." *Ibid.*

In the *Wolf* case, the Court rejected one absolute. In *Rochin*, it rejected another.

In holding that not all conduct which by federal law is an unreasonable search and seizure vitiates a conviction in connection with which it transpires, *Wolf* did not and could not decide that as long as relevant evidence adequately supports a conviction, it is immaterial how such evidence was acquired. For the exact holding of that case is defined by the question to which the opinion addressed itself: "Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks* v. *United States*, 232 U. S. 383?" Thus, *Wolf* did not change prior applications of the requirements of due process, whereby this Court considered the whole course of events by which a conviction was obtained and was not restricted to consideration of the trustworthiness of the evidence.

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Rochin decided that the Due Process Clause of the Fourteenth Amendment does not leave States free in their prosecutions for crime. The Clause puts limits on the wide discretion of a State in the process of enforcing its criminal law. The holding of the case is that a State cannot resort to methods that offend civilized standards of decency and fairness. The conviction in the *Rochin* case was found to offend due process not because evidence had been obtained through an unauthorized search and seizure or was the fruit of compulsory self-incrimination. Neither of these concepts, relevant to federal prosecutions, was invoked by the Court in *Rochin*, so of course the *Wolf* case was not mentioned. While there is in the case before us, as there was in *Rochin*, an element of unreasonable search and seizure, what is decisive here, as in *Rochin*, is additional aggravating conduct which the Court finds repulsive.

Thus, the basis on which this case should be adjudicated is laid down in *Rochin:* "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" 342 U. S., at 169, quoting from *Malinski* v. *New York*, 324 U. S. 401, at 416–417.

This brings us to the specific circumstances of this case. This is a summary of the conduct of the police:

(1) They secretly made a key to the Irvines' front door.

(2) By boring a hole in the roof of the house and using the key they had made to enter, they installed a secret microphone in the Irvine house with a listening post in a neighboring garage where officers listened in relays.

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(3) Using their key, they entered the house twice again to move the microphone in order to cut out interference from a fluorescent lamp. The first time they moved it into Mr. and Mrs. Irvines' bedroom, and later into their bedroom closet.

(4) Using their key, they entered the house on the night of the arrest and in the course of the arrest made a search for which they had no warrant.

There was lacking here physical violence, even to the restricted extent employed in *Rochin*. We have here, however, a more powerful and offensive control over the Irvines' life than a single, limited physical trespass. Certainly the conduct of the police here went far beyond a bare search and seizure. The police devised means to hear every word that was said in the Irvine household for more than a month. Those affirming the conviction find that this conduct, in its entirety, is "almost incredible if it were not admitted." Surely the Court does not propose to announce a new absolute, namely, that even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by State officials. Considering the progress that scientific devices are making in extracting evidence without violence or bodily harm, satisfaction of due process would depend on the astuteness and subtlety with which the police engage in offensive practices and drastically invade privacy without authority of law. In words that seem too prophetic of this case, it has been said that "[d]iscovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." Brandeis, J., dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 473.

The underlying reasoning of *Rochin* rejected the notion that States may secure a conviction by any form of skul-

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duggery so long as it does not involve physical violence. The cases in which coercive or physical infringements of the dignity and privacy of the individual were involved were not deemed "sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'" 342 U. S., at 173.

Since due process is not a mechanical yardstick, it does not afford mechanical answers. In applying the Due Process Clause judicial judgment is involved in an empiric process in the sense that results are not predetermined or mechanically ascertainable. But that is a very different thing from conceiving the results as *ad hoc* decisions in the opprobrious sense of *ad hoc*. Empiricism implies judgment upon variant situations by the wisdom of experience. *Ad hoc*ness in adjudication means treating a particular case by itself and not in relation to the meaning of a course of decisions and the guides they serve for the future. There is all the difference in the world between disposing of a case as though it were a discrete instance and recognizing it as part of the process of judgment, taking its place in relation to what went before and further cutting a channel for what is to come.

The effort to imprison due process within tidy categories misconceives its nature and is a futile endeavor to save the judicial function from the pains of judicial judgment. It is pertinent to recall how the Court dealt with this craving for unattainable certainty in the *Rochin* case:

> "The vague contours of the Due Process Clause do not leave judges at large. We may not draw on

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our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. See Cardozo, The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions." 342 U. S., at 170–171.

Nor can we dispose of this case by satisfying ourselves that the defendant's guilt was proven by trustworthy evidence and then finding, or devising, other means whereby the police may be discouraged from using illegal methods to acquire such evidence.

This Court has rejected the notion that because a conviction is established on incontestable proof of guilt it may stand, no matter how the proof was secured. Observance of due process has to do not with questions of guilt or innocence but the mode by which guilt is ascertained. Mere errors of law in the conduct of State trials afford no basis for relief under the Fourteenth Amendment, and a wide swath of discretion must be left to the State Courts in such matters. But when a conviction is secured by methods which offend elementary standards of justice, the victim of such methods may invoke the protection of the Fourteenth Amendment because that Amendment guarantees him a trial fundamentally fair in the sense in which that idea is incorporated in due process. If, as in *Rochin*, "[o]n the facts of this case the conviction of the petitioner has been obtained

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by methods that offend the Due Process Clause," 342 U. S., at 174, it is no answer to say that the offending policemen and prosecutors who utilize outrageous methods should be punished for their misconduct.[1]

Of course it is a loss to the community when a conviction is overturned because the indefensible means by which it was obtained cannot be squared with the commands of due process. A new trial is necessitated, and by reason of the exclusion of evidence derived from the unfair aspects of the prior prosecution a guilty defendant may escape. But the people can avoid such miscarriages of justice. A sturdy, self-respecting democratic community should not put up with lawless police and prosecutors. "Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism." [2]

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[1] That the prosecution in this case, with the sanction of the courts, flouted a legislatively declared philosophy against such miscreant conduct and made it a policy merely on paper, does not make the conduct any the less a disregard of due process. Cf. *Rochin* v. *California*, *supra*, at 167.

[2] Statement by Director J. Edgar Hoover of the Federal Bureau of Investigation in FBI Law Enforcement Bulletin, September 1952, p. 1.

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SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1953.

Patrick E. Irvine, Petitioner, *v.* People of the State of California.	On Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

[February 8, 1954.]

Mr. Justice Douglas, dissenting.

The search and seizure conducted in this case smack of the police state, not the free America the Bill of Rights envisaged.

The police and their agents first made a key to the home of a suspect. Then they bored a hole in the roof of his house. Using the key they entered the house, installed a microphone, and attached it to a wire which ran through the hole in the roof to a nearby garage where officers listened in relays. Twice more they used the key to enter the house in order to adjust the microphone. First they moved it into the bedroom where the suspect and his wife slept. Next, they put the microphone into the bedroom closet. Then they used the key to enter the house to arrest the suspect. They had no search warrant; but they ransacked the house. Moreover, they examined the suspect's hands under an ultraviolet lamp to see if he had handled betting slips which they had earlier impregnated with fluorescent powder.

The evidence so obtained was used by California to send the suspect, petitioner here, to prison.

What transpired here was as revolting as the abuses arising out of the writs of assistance against which James

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Otis complained. Otis in his speech against the writs[1] had this to say:

> "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and every thing in their way: and whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient."

In those days courts put their sanction behind the unlawful invasion of privacy by issuing the general warrant that permitted unlimited searches. There is no essential difference between that and the action we take today. Today we throw the weight of the Government on the side of the lawless search by affirming a conviction based on evidence obtained by it. Today we compound the grievance against which Otis complained. Not only is privacy invaded. The lawless invasion is officially approved as the means of sending a man to prison.

I protest against this use of *unconstitutional* evidence. It is no answer that the man is doubtless guilty. The Bill of Rights was designed to protect every accused against practices of the police which history showed were oppressive of liberty. The guarantee against unreasonable searches and seizures contained in the Fourth Amendment was one of those safeguards. In 1914 a unanimous Court decided that officers who obtained evidence in violation of that guarantee could not use it

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[1] Tudor, Life of James Otis (1823), pp. 66–67.

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in prosecutions in the federal courts. *Weeks* v. *United States*, 232 U. S. 383. Lawless action of the federal police, it said, "should find no sanction in the judgments of the courts. . . ." *Id.*, p. 392.

The departure from that principle which the Court made in 1949 in *Wolf* v. *Colorado*, 338 U. S. 25, is part of the deterioration which civil liberties have suffered in recent years. In that case the Court held that evidence obtained in violation of the Fourth Amendment, though inadmissible in federal prosecutions, could be used in prosecutions in the state courts. Mr. Justice Murphy, dissenting, pointed out the peril of that step, *id.*, p. 44:

> "The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police."

Exclusion of evidence is indeed the only effective sanction. If the evidence can be used, no matter how lawless the search, the protection of the Fourth Amendment, to use the words of the Court in the *Weeks* case "might as well be stricken from the Constitution." 232 U. S., at 393.

The suggestion that the remedy for lawless conduct by the local police is through federal prosecution under the civil rights laws relegates constitutional rights under the Fourth Amendment to a lowly status. An already overburdened Department of Justice, busily engaged in law enforcement, cannot be expected to devote its energies to supervising local police activities and prosecuting

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police officers, except in rare and occasional instances.[2] And the hostility which such prosecutions have received here (see *Screws* v. *United States*, 325 U. S. 91, especially pp. 138 *et seq.*) hardly encourages putting the federal prosecutor on the track of state officials who take *unconstitutional* short cuts in enforcing state laws.[3]

If unreasonable searches and seizures that violate the privacy which the Fourth Amendment protects are to be outlawed, this is the time and the occasion to do it. If police officers know that evidence obtained by their unlawful acts cannot be used in the courts, they will clean their own houses and put an end to this kind of action. But as long as courts will receive the evidence, the police will act lawlessly and the rights of the individual will suffer. We should throw our weight on the side of the citizen and against the lawless police. We should be alert to see that no *unconstitutional* evidence is used to convict any person in America.

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[2] For an analysis of the civil rights suits instituted by the Department of Justice see the Appendix to this opinion.

[3] The current hostility towards federal actions—both criminal and civil—under the civil rights laws is further evidenced by *United States* v. *Williams*, 341 U. S. 70; *Tenney* v. *Brandhove*, 341 U. S. 367; *Collins* v. *Hardyman*, 341 U. S. 651; *Whittington* v. *Johnson*, 201 F. 2d 810, cert. denied, 346 U. S. 867; *Francis* v. *Crafts*, 203 F. 2d 809, cert. denied, 346 U. S. 835.

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APPENDIX.

Mr. Justice Murphy, when Attorney General, was responsible for the creation of the Civil Rights Section in the Department of Justice. That was on February 3, 1939. In 1947 Mr. Justice Clark, then Attorney General, reported that the Section had in the eight years of its existence investigated nearly 850 complaints, instituted prosecutions in 178 cases, and obtained the conviction of more than 130 defendants. Clark, A Federal Prosecutor Looks at the Civil Rights Statutes, 47 Col. L. Rev. 175, 181. See also Report of the President's Committee on Civil Rights: To Secure These Rights (1947), pp. 114 *et seq.*

A more recent account of the work of the Civil Rights Section will be found in Putzel, Federal Civil Rights Enforcement: A Current Appraisal, 99 U. of Pa. L. Rev. 439 (1951). It is there stated that on the average 20 civil rights cases are prosecuted a year, acquittals and convictions being about equally divided. *Id.*, p. 449, n. 43. These figures are confirmed by the Administrative Office of the United States Courts. Records available in that office show the following number of civil rights prosecutions filed in the district courts in the years since 1947:

Fiscal year	*1947*	*1948*	*1949*	*1950*	*1951*	*1952*	*1953*
Total cases.....	10	13	22	18	16	15	29
Total defendants..	26	53	66	72	69	49	92

More detailed figures are available for the past three fiscal years. The following table shows the number of defendants who actually went to trial, the disposition of

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their cases, and the sentences imposed on those who were convicted:

Fiscal year	*1951*	*1952*	*1953*
Total defendants	22	50	54
Not convicted: Total	11	20	45
Dismissed	4	2	18
Acquitted by court	.....	.....	1
Acquitted by jury	7	18	26
Convicted: Total	11	30	9
Pleas of guilty or nolo contendere	3	21	1
Convicted by court	.....	5	
Convicted by jury	8	4	8
Type of sentence: Imprisonment total	7	4	8
1–6 months	.....	.....	1
6 months to 1 year, 1 day	7	.....	7
More than 1 year, 1 day	.....	4	
Type of sentence: Probation and suspended sentence	2	20	
Type of sentence: Fine only	2	6	1
Average sentence of imprisonment (months)	10.9	16.5	9.4

Note: These figures from the Administrative Office include all prosecutions filed and conducted under all of the Sections of the Criminal Code which are usually called Civil Rights Sections, that is, 18 U. S. C. §§ 241–244. Use of §§ 243 and 244, however, has been very rare, so that most of the figures quoted involve prosecutions under either §§ 241 or 242. The figures set out in the second table do not take into account such appellate reversals as may have been entered, and they include only those post-judgment motions in the district court which were disposed of before the end of the fiscal year in question.

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The Code provisions in question read as follows:

"§ 241. *Conspiracy against rights of citizens.*

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

"§ 242. *Deprivation of rights under color of law.*

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"§ 243. *Exclusion of jurors on account of race or color.*

"No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged

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with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

"§ 244. *Discrimination against person wearing uniform of armed forces.*

"Whoever, being a proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the District of Columbia, or in any Territory, or Possession of the United States, causes any person wearing the uniform of any of the armed forces of the United States to be discriminated against because of that uniform, shall be fined not more than $500."

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